85-1134

No. 85-

Supreme Court, U.S.
FILED
JAN 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FIRST UNITED FUND, LTD.,
Petitioner,

v.

BROCKTON SAVINGS BANK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does a federal district court have "inherent power" to issue an order contrary to the express language of an applicable federal rule of civil procedure, and then to enter a substantial default judgment against a defendant for failure to comply with such order?

2. Does a federal district court have "inherent power" to enter a substantial default judgment ($783,868.63) against a defendant, a principal basis for which is the defendant's failure to comply with a magistrate's order that its employee-witnesses, located outside of the territorial limits of the district court's subpoena power set forth in Fed. R. Civ. P. 45, attend and be examined at a hearing on plaintiff's motion for discovery sanctions?

3. Does Fed. R. Civ. P. 55 afford a defaulted defendant the right, at a post-default hearing to assess damages, to establish the extent to which a plaintiff's conduct proximately caused some or all of its damages, where plaintiff's total loss is otherwise liquidated and certain in amount?

LIST OF PARTIES

The caption of the case in this Court contains a list of all of the parties that participated in the proceedings in the United States Court of Appeals for the First Circuit. Defendants Peat, Marwick, Mitchell & Co., James Blanton and C. Dean York, although named as appellees in the caption of the case in the court of appeals, did not participate in that appeal, having earlier had plaintiff's claims against them dismissed by the United States District Court for the District of Massachusetts. Petitioner believes that defendants-appellees Peat, Marwick, Mitchell & Co., James Blanton and C. Dean York have no interest in the outcome of this petition, and so notifies this Court and its Clerk pursuant to Rule 19.6 of this Court.

GLOSSARY OF ABBREVIATIONS

The following abbreviations will be used for participants in the proceedings below or other entities:

First United	Petitioner First United Fund, Ltd.
Brockton	Respondent Brockton Savings Bank

Peat, Marwick	Peat, Marwick, Mitchell & Co.
Penn Square	Penn Square Bank, N.A.
FDIC	Federal Deposit Insurance Corporation
FSLIC	Federal Savings and Loan Insurance Corporation

LIST OF PARENTS, SUBSIDIARIES AND AFFILIATES

Petitioner First United is a wholly-owned subsidiary of First United Financial Corporation.

The following entities are also wholly-owned subsidiaries of First United Financial Corporation:

Seaside Ventures, Ltd.

Interactive Information Systems, Inc. (formerly First United Satellite Information Systems, Inc.)

Consolidated Realty Group, Inc. (formerly First United Realty Corporation)

Second Source, Inc.

The following entity is a wholly-owned subsidiary of First United Fund, Ltd.:

Bingo Palace, Inc.

The following are affiliated entities:

Cindy Real Estate Partners, Inc.

First Fund Management Corporation

First New York Securities, Inc.

Hawaiian Properties, Inc.

MFS Partners, Inc.

MN Associates, Ltd.

Stanmark Corporation

Waikiki Gateway Partners, Inc.

Nevada Holding Company, Inc.

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BROCKTON SAVINGS BANK,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner First United respectfully prays that a writ of certiorari issue from this Court to the United States Court of Appeals for the First Circuit to review the judgment entered by the court of appeals on August 26, 1985.

OPINIONS BELOW

The final default judgment of the United States District Court for the District of Massachusetts (App. 113a) was entered on January 29, 1985 and is unreported. The opinion of the United States magistrate recommending entry of a default judgment and other sanctions (App. 83a) was entered on May 14, 1984 and is unreported. The order of the district court adopting the magistrate's recommendation (App. 111a) was entered on August 9, 1985 and is unreported. The opinion and judgment of the

United States Court of Appeals for the First Circuit (App. 1a, 114a) were entered on August 26, 1985 and are reported at 771 F.2d 5 (1st Cir. 1985).

JURISDICTION

The opinion and judgment of the court of appeals were entered on August 26, 1985. (App. 1a, 114a). First United filed a petition for rehearing and suggestion for rehearing *en banc* on September 9, 1985, which was denied on October 7, 1985. (App. 115a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The following constitutional provision and rules of civil procedure involved in this case are reproduced in the Appendix:

1. The Due Process Clause, U.S. Const. amend. V (App. 117a).
2. Fed. R. Civ. P. 37(b) (App. 119a).
3. Fed. R. Civ. P. 45(e)(1) (App. 123a).
4. Fed. R. Civ. P. 55 (App. 124a).
5. Fed. R. Civ. P. 60(b) (App. 126a).

STATEMENT OF THE CASE

This petition seeks review of the judgment of the court of appeals affirming a default judgment entered against petitioner First United in the amount of $783,868.63, plus attorneys' fees and costs. The default judgment was entered on January 29, 1985 by the United States District Court for the District of Massachusetts, based on a recommendation by a magistrate, as a sanction for alleged discovery abuses by First United and its former counsel.

The principal discovery dispute that led the district court to default First United concerned whether First

United had wilfully disobeyed a magistrate's order to produce copies of solicitation letters sent to prospective clients. First United had produced copies of the word processing forms of such letters sent as part of regular mass mailings, but did not produce copies of all of the actual letters mailed because it did not retain them. The magistrate, disbelieving First United's representations and affidavit that it did not retain copies of all actual letters mailed, ordered First United to produce its president and an employee-affiant, both nonresidents of the forum district, for cross-examination by him. First United's disobedience of that order is the basic reason for the extreme sanctions recommended by the magistrate.

On February 24, 1983, Brockton filed a complaint against First United, Peat Marwick and two partners of Peat Marwick charging that First United, a broker-dealer in securities, made false representations to Brockton that led Brockton, on April 28, 1982, to purchase a $1,000,000 certificate of deposit ("CD") (bearing 16% interest) in Penn Square. (App. 128a). On July 5, 1982, Penn Square was declared insolvent. (App. 2a, 135a). Brockton, alleging violations of federal securities laws, various state statutes and the common law, claimed $1,000,000 in compensatory damages, plus multiple damages, interest and attorneys' fees. (App. 128a-158a). On March 25, 1983, First United answered, generally denying the complaint's allegations, and asserting affirmative defenses, one of which was that Brockton's loss resulted from its own conduct. (App. 179a, 187a).

On February 24, 1983, Brockton had requested that First United answer interrogatories and produce documents, including all documents relating to its solicitation of prospective clients. (App. 159a, 172a). First United objected to Brockton's requests on various grounds. (App. 189a, 211a). First United did produce certain of its word processing forms of solicitation letters. (App. 193a, 213a). No mention was made in First United's responses of copies of *actual* letters sent to its potential customers.

(App. 189a-218a). On May 9, 1983, Brockton moved to compel further discovery, but did not specifically challenge First United's production of only the word processing forms of the solicitation letters. (App. 219a-225a).

Brockton's motion was heard by a magistrate on October 18, 1983.[1] (App. 18a-35a). First United stressed the irrelevance and burden of Brockton's requests, which would have required production of thousands of transaction confirmation slips. (*Id.*) Although Brockton demanded all information as to other buyers of CDs (App. 23a-25a), no specific discussion was had as to the production of copies of *actual* solicitation letters sent to prospective clients, as distinguished from the word processing forms of those letters (App. 18a-35a), certain of which Brockton had already received. (App. 23a-24a, 193a, 213a). The magistrate ordered interrogatories answered by November 23, 1983, and all documents produced by December 5, 1983. (App. 32a-34a).

On January 18, 1984, the district judge entered a limited protective order in response to an earlier request by First United, and ordered all documents produced within ten days. (App. 91a). After a production of documents by First United on January 27, 1984 (including twelve additional word processing forms of solicitation letters) (App. 91a-92a), Brockton moved on February 7, 1984, for sanctions pursuant to Fed. R. Civ. P. 37(b), including entry of a default judgment and other relief. (App. 228a). In connection with its February 7 motion, Brockton complained for the first time that First United had produced only forms of the solicitation letters.

On March 1, 1984, the magistrate heard Brockton's motion for sanctions. (App. 37a-66a). Before the hearing,

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[1] The district court first considered Brockton's motion to compel further discovery at an off-the-record conference on August 18, 1983. The court directed First United to produce a list of all Penn Square CD transactions, which list First United subsequently produced with the names of its clients opaqued for confidentiality reasons. (App. 88a-89a). Brockton then renewed its motion to compel.

First United filed the affidavit of Christine L. Alexander, a secretary responsible for mailing solicitation letters, attesting that First United retained only the various forms of the letters, and not copies of actual letters mailed. (App. 232a). *See also* App. 234a, 236a. At the hearing, the magistrate characterized Ms. Alexander's affidavit as a "notice of destruction" (App. 53a); stated that he had never seen "this type of defiance" (App. 45a); and said that he found First United's retention of only the forms of its solicitation letters "incredible." (App. 52a). He thereupon ordered First United's counsel to tell the president of his client and Ms. Alexander to "go down to LaGuardia" and to "get on the shuttle and get up here" that afternoon. (App. 53a, 54a). The hearing was recessed for that purpose. (App. 55a).

At the resumed hearing on March 1, First United's counsel advised the magistrate that First United's president could not be reached. (App. 55a). First United's counsel offered a deposition of his client concerning its non-retention of copies of actual letters mailed. (App. 58a, 62a). The magistrate rejected the offer, stating: "I want your client produced in this courtroom—in this courtroom under oath . . . ." (App. 62a). The hearing was again recessed for that purpose until March 6. (App. 65a).

It is not disputed that First United, its president and Ms. Alexander all reside beyond the territorial limits of the district court's subpoena power as defined by Fed. R. Civ. P. 45(e)(1). (App. 9a). At the resumed hearing on March 6, 1984, First United's counsel advised the magistrate that First United would not produce the witnesses for examination, stating first that he believed that First United had been given an opportunity, but had not been ordered, to produce the witnesses. (App. 68a). When the magistrate advised counsel that he had ordered the witnesses to appear, counsel stated that First United "chooses not to obey." (*Id.*) In response, the magistrate

announced his intention to recommend the full range of possible sanctions, including a default judgment, contempt sanctions, attorneys' fees, and the institution of disciplinary proceedings against counsel.[2] (App. 72a-73a).

On May 14, 1984, the magistrate filed his opinion recommending, *inter alia*, a default judgment against First United. (App. 83a-110a). Although the magistrate decided that First United had violated three other court orders, a major, if not the principal, reason for the sanctions was First United's disobedience of the magistrate's March 1 order to produce the nonresidents for cross-examination. (App. 93a-100a, 108a). He made no finding or conclusion that First United's conduct, apart from its failure to produce the witnesses, justified such extreme sanctions. *See generally* App. 83a-110a. The magistrate rejected First United's argument that Rule 45 limited his power to compel attendance of nonresidents. He reasoned that he possessed such power because, in appropriate circumstances, he could order that nonresident parties be deposed in the forum (App. 97a), and concluded that the "power to compel further testimony, at least on the matter at issue, is inherent and so obvious as to require no citation of authority." (App. 98a).

On August 9, 1984, without opinion, briefs or argument, the district court adopted the magistrate's recommendation *in toto*. (App. 111a). On August 23, 1984, Brockton moved for a default judgment of $613,333.33 (the balance of the $1,000,000 CD not yet recovered from the FDIC), plus interest, costs and unliquidated attorneys' fees. The magistrate entertained Brockton's motion on January 24, 1985. First United contended that it was

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[2] On March 16, 1984, First United retained its present counsel, who appeared at hearings before the magistrate on March 19 and 21, 1984. (App. 7a, 95a). New counsel argued, *inter alia*, in a brief to the magistrate, that, under Fed. R. Civ. P. 45, the magistrate lacked power to compel the nonresident witnesses to appear before him, and thus could not sanction First United for disobeying that order. (App. 95a-96a).

entitled to prove, at an evidentiary hearing, that some or all of Brockton's loss was proximately caused by Brockton's behavior in investing an amount substantially in excess of the limits of FDIC insurance on deposits. (App. 8a). The magistrate ruled that this causation argument was foreclosed by the default. (*Id.*) On January 29, 1985, he recommended entry of judgment for $783,868.63, plus costs and unliquidated attorneys' fees.[3] (App. 112a). On January 29, 1985, the district court, again without opinion or argument, entered judgment as recommended. (App. 113a). First United filed a notice of appeal on February 21, 1985.

On August 26, 1985, the court of appeals affirmed the district court's judgment. (App. 1a, 114a). The court did not hold that the magistrate had the power to compel the nonresidents to appear, notwithstanding the strictures of Fed. R. Civ. P. 45(e)(1) (App. 8a-14a); nor did it hold that the default judgment was an appropriate sanction under Fed. R. Civ. P. 37(b). (App. 11a). Instead, the court of appeals, observing that this Court had instructed it to favor a district court's exercise of discretion (App. 10a), concluded that the judgment was an appropriate exercise of the district court's "inherent power" to sanction "abusive litigation practices." (App. 11a-14a). The court of appeals also held that the question whether and to what extent Brockton's loss was proximately caused by its own conduct was foreclosed by the default because Brockton's loss was liquidated and certain. (App. 14a-17a). First United's petition for rehearing, addressed to this latter holding, was denied without opinion on October 7, 1985. (App. 115a).

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[3] The parties stipulated that the $783,868.63 figure was calculated correctly, assuming that the proximate cause issue was foreclosed by the default. The stipulation preserved First United's right to raise the proximate cause issue. (App. 8a).

REASONS FOR GRANTING THE WRIT

This case presents the question whether a district court has inherent power to enter an order that contravenes a specific rule of civil procedure, for the purpose of investigating alleged discovery abuses, and then to enter a default judgment based on the defendant's refusal to comply with such an order. At bar, a magistrate ordered First United's nonresident employees to appear at hearings in the forum, in contravention of the express language of Fed. R. Civ. P. 45. The court of appeals held, in effect, that the express commands of Rule 45 were overridden by the judiciary's "inherent power" to explore and remedy abusive litigation practices.

The analysis adopted by the court of appeals disregards this Court's directive that the propriety of discovery sanctions not be judged by notions of "inherent power." The court's ruling also conflicts with applicable decisions of this Court, and of other courts of appeals, that there is no inherent judicial power to do what is specifically proscribed by applicable rules of civil procedure. Finally, the court's analysis offends traditional principles of due process because there is absent at bar the essential precondition, established by this Court in *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909), to the due process validity of a default judgment, namely, that the order violated be a valid one.

The court of appeals further erred in affirming the district court's refusal to permit First United to prove, after default, that some or all of Brockton's damages were proximately caused by its own actions and Peat Marwick's conduct. The court of appeals' ruling, if it stands, severely limits the ability of litigants to contest damage awards at post-default hearings pursuant to Fed. R. Civ. P. 55.

I. The "Inherent Power" Analysis Adopted by the Court of Appeals Sanctions a Departure from the Accepted and Usual Course of Judicial Proceedings Established by Applicable Decisions of This Court and Courts of Appeals.

A. *The Court of Appeals' Analysis Disregards This Court's Directive That Inherent Power Not Be Used to Analyze the Propriety of Discovery Sanctions.*

Rule 45(e)(1) provides in relevant part:

> A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial . . . .

It is uncontested that First United, its president and Ms. Alexander, First United's affiant, are located or reside beyond the territorial limits of the subpoena power conferred by Rule 45(e)(1).

It was for this reason that First United argued to the magistrate and the court of appeals that the magistrate's March 1, 1984 oral order directing the attendance of First United's nonresident employee-witnesses at the March 1 and March 6 hearings was invalid because it exceeded the subpoena powers delimited by Rule 45(e)(1). *In re Guthrie*, 733 F.2d 634, 637-39 (4th Cir. 1984); *Jaynes v. Jaynes*, 496 F.2d 9, 10 (2d Cir. 1974); *GFI Computer Industries v. Fry*, 476 F.2d 1, 5 (5th Cir. 1973); *Steel, Inc. v. Atchison, Topeka & Santa Fe Railway*, 41 F.R.D. 337, 339 (D. Kan. 1967).[4] If the magistrate's March 1 order was invalid, First United cannot be sanctioned for having violated it. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 354 (1909) (propriety of sanc-

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[4] Rule 45(e)(1) does not distinguish hearings and trials. Hence, the holdings in *GFI Computer Industries*, and the other cases cited, apply with equal force to subpoenas to attend hearings.

tions for failure to make discovery depends on the legality and sufficiency of the underlying discovery orders).[5]

In affirming the default judgment, the court of appeals did not question this legal framework. Indeed, it treated the magistrate's order as subject to Rule 45, and noted initially that "how one characterizes the challenged court action probably determines the result one reaches on this issue." (App. 9a). Nonetheless, the court of appeals chose not to rule on the validity under Rule 45 of the order compelling the nonresidents to attend (App. 8a-14a), and declined even to decide whether the default judgment was an appropriate Rule 37 sanction. (App. 11a). The court of appeals concluded instead that the magistrate had the "inherent power" to investigate, explore and sanction "abusive litigation practices." (App. 11a-14a).

The "inherent power" approach taken by the court of appeals is in direct conflict with this Court's directive in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207 (1958). In that case, the Court ruled that the propriety of discovery sanctions was to be judged against the express powers granted by Fed. R. Civ. P. 37, and the other rules of civil procedure, *and not by notions of inherent power.* This Court made it clear that reliance on inherent power "can only obscure analysis" of the propriety of discovery sanctions. 357 U.S. at 207.

By relying on "inherent power," the court of appeals in fact "obscured the analysis" of the propriety of the severe sanctions entered by the district court. If, as

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[5] Similarly, no contempt may be imposed for failure to comply with an order to produce witnesses, when such order is issued in contravention of Rule 45. *See* In re Guthrie, 733 F.2d 634, 639 (4th Cir. 1984) (reversing order holding nonresident witness in contempt for refusing to appear before forum court).

claimed by Brockton, First United had violated three other district court discovery orders prior to the issuance of the magistrate's order directing the appearance of the nonresidents, the magistrate had *express* power to recommend sanctions against First United under Rule 37(b)(2), a fact recognized by the court of appeals. (App. 10a). Hence, no resort to inherent power was necessary.[6] The issue before the court below was whether First United's violation of the March 1 oral order could serve as an *independent ground*, and indeed the principal ground, for an award of extreme sanctions, where such order exceeded the subpoena powers granted by Rule 45. The court of appeals thus fell into precisely that error against which this Court cautioned in *Rogers*.

B. *The Court of Appeals' Analysis Conflicts with Applicable Decisions of This Court and Courts of Appeals That There Is No Inherent Judicial Power in Excess of Power Granted by Governing Statutes or Rules of Civil Procedure.*

The court of appeals held, in effect, that a district court has inherent power to compel the presence of nonresidents in the forum to enable the court to explore and remedy abusive litigation practices. This analysis contravenes the express limitations on the district court's subpoena powers embodied in Rule 45(e)(1). It thus conflicts with applicable decisions of this Court and courts of appeals concerning the interplay between inherent power and governing statutes or rules of civil procedure.

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[6] The court of appeals' resort to "inherent power," a needless one if the court felt that it had express power to sustain the default based on First United's ostensible violations of other discovery orders, is strong evidence that such other violations were not so egregious as to warrant the sanctions imposed. The absence of any finding by the magistrate that First United's other conduct, standing alone, justified the default is instructive on this point. *See*, n.10, *infra*.

"The Federal Rules of Civil Procedure govern procedures in all civil suits in the United States district courts unless otherwise specified, Fed. R. Civ. P. 1, and these Rules have the effect of law through the power delegated by Congress to the Supreme Court in the Rules Enabling Act of 1934, 28 U.S.C. § 2072." *In re Guthrie*, 733 F.2d 634, 637 (4th Cir. 1984). *See also United States for the Use of Tanos v. St. Paul Mercury Insurance Co.*, 361 F.2d 838, 839 (5th Cir.), *cert. denied*, 385 U.S. 971 (1966); *Rumsey v. George E. Failing Co.*, 333 F.2d 960, 962 (10th Cir. 1964); *Nordmeyer v. Sanzone*, 315 F.2d 780, 781-82 (6th Cir. 1963). This Court has declared that the judiciary has "no power to rewrite the Rules by judicial interpretations." *Harris v. Nelson*, 394 U.S. 286, 298 (1969).

As recently as November 18, 1985, this Court reaffirmed the principle that, where a statute or rule confers powers on the judiciary, the terms of the specific grant, and not expansive conceptions of judicial authority or inherent power, determine the scope of the power at issue. In *Pennsylvania Bureau of Correction v. United States Marshals Service*, 54 U.S.L.W. 4001 (U.S. Nov. 18, 1985) (No. 84-489), this Court held that a district court lacks authority to issue writs compelling the United States Marshals Service to transport state prisoners, not otherwise in the Marshals' custody, to a federal courthouse to testify.[7] The Court held that, because the powers afforded by 28 U.S.C. § 2243 (writs of habeas corpus *ad testificandum*) and Fed. R. Civ. P. 81(a)(2) (same) expressly extend only to custodial prisoners, writs directing the production of noncustodial prisoners were in excess of the district court's powers. 54 U.S.L.W. at 4003.

Rejecting the contention that the broad, generalized expression of judicial power in the All Writs Act, 28 U.S.C. § 1651, authorized the contested writs, the Court stated:

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[7] The Court left open the question whether such writs might be lawful in extraordinary circumstances. 54 U.S.L.W. at 4003.

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.

54 U.S.L.W. at 4003. The Court implicitly disavowed the argument, raised in Justice Stevens' dissenting opinion, that the challenged order was an appropriate exercise of the district court's inherent power. 54 U.S.L.W. at 4005.[8] *See also Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 259 (1975). The court of appeals' ruling also conflicts generally with the holdings of various circuit courts of appeals that inherent powers may be invoked only in the absence of contrary legislative intent or direction. *See, e.g., Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 563 (3d Cir. 1985); *Ex parte United States*, 101 F.2d 870, 878 (7th Cir.), *aff'd sub nom. United States v. Stone*, 308 U.S. 519 (1939).

The ruling below is the first instance in which inherent power has been invoked to expand the subpoena powers conferred by Rule 45. As such, the ruling is in direct conflict with the Fourth Circuit's ruling in *In re Guthrie*, 733 F.2d 634 (4th Cir. 1984). In *Guthrie*, the Fourth Circuit reversed a contempt judgment predicated on the refusal of a nonresident, non-party witness to comply with a Rule 45(d) deposition subpoena served outside

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[8] At bar, the court of appeals' analogy to the judiciary's inherent power to investigate fraud in procuring judgments (App. 12a) was misplaced. First, Fed. R. Civ. P. 60(b), and the Advisory Committee notes thereto, establish that Rule 60(b) does not limit the previously existing power of the judiciary to investigate fraud in obtaining a judgment. Second, Rule 60(b), and those cases concerning the inherent power to investigate fraud, acknowledge the limitations imposed by the applicable statutes or rules of civil procedure. *See, e.g.*, Universal Oil Prod. Co. v. Root Refin. Co., 328 U.S. 575, 580 (1946) (A federal court's inherent power to investigate whether a judgment was obtained by fraud includes the power to "bring before it *by appropriate means* all those who may be affected by the outcome of its investigation."; emphasis added).

the judicial district wherein the subpoena had issued. The district court had denied a motion to quash the subpoena, finding that it had "inherent power" to issue it. *Id.* at 636. The Fourth Circuit reversed:

> *Whatever inherent powers the district courts may once have had, they now have no power to issue a deposition subpoena unless expressly or impliedly so authorized by the Rules.* Neither plaintiff nor the District Court has identified any authority in support of such an extraordinary notion of "inherent power" exceeding the scope of the Rules.

Id. at 637 (emphasis added). Turning to an analysis of Rule 45, the Fourth Circuit concluded:

> [Rule] 45(e)(1) only authorizes the clerk of the district court where a hearing or trial is held to issue subpoenas compelling attendance, and unlike 45(d), is quite explicit about the geographic limits of valid service . . . . [quotation of rule omitted] Thus, a nonparty witness outside the state in which the district court sits, and not within the 100-mile bulge, may not be compelled to attend a hearing or trial, and the only remedy available to litigants, if the witness will not attend voluntarily, is to take his deposition pursuant to [Rule] 45(d).

Id. (citation omitted). Thus, contrary to the court of appeals' ruling at bar, the Fourth Circuit has held that the express terms of Rule 45, and not broad conceptions of inherent power, mark the boundaries of the district court's subpoena powers.

The decision below also conflicts with the ruling of the Fifth Circuit in *GFI Computer Industries v. Fry*, 476 F.2d 1 (5th Cir. 1973). In *GFI*, the district court had entered a default judgment against a nonresident defendant, in part because the defendant had refused to obey a court order compelling defendant's appearance at trial. The Fifth Circuit reversed the default as "incorrect," without reference to notions of "inherent power,"

ruling that "the court had *no* power to force a civil defendant outside its subpoena jurisdiction to appear personally at the trial and there submit to examination. . . ." *Id.* at 5 (emphasis added). Thus, unlike the opinion below, the Fifth Circuit's ruling prohibits a district court from imposing a sanction based even in part on a nonresident's refusal to obey an order to attend a hearing in the forum.[9]

This Court should grant certiorari to resolve the critical balance between Rule 45 and the inherent power of the lower federal courts.

C. *The Court of Appeals' Analysis Offends Traditional Principles of Due Process.*

Discovery sanctions are subject to the due process requirements of the Fifth Amendment. *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705-07 (1982); *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209 (1958) ("The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law . . . .").

This Court has repeatedly admonished that entry of a default judgment, or the foreclosure of a party's right to litigate particular issues, raises due process concerns. *Insurance Corporation of Ireland*, 456 U.S. at 705-07; *Rogers*, 357 U.S. at 209; *Hammond Packing Co. v. Ar-*

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[9] The court of appeals, apparently senstitive to the mandates of Rule 45, speculated that the order to produce the nonresidents might be valid if the March 6 hearing was viewed not as a "hearing" in the Rule 45(e)(1) sense, but as a "depositional hearing." (App. 11a). The court did not hold that the March 6 hearing was a "depositional hearing," the precise nature of which is unclear. At bar, First United's counsel offered the deposition testimony of his client's representatives in lieu of their attendance at a hearing. (App. 62a). The magistrate rejected this offer. (*Id.*)

kansas, 212 U.S. 322 (1909). In *Hammond Packing*, the Court decided that the due process concerns raised by default or issue foreclosure as discovery sanctions are overcome by an adverse presumption that there is no merit to the claims or defenses of a party who fails to comply with [illegible]'s discovery orders. In affirming a state court default judgment for failure to comply with discovery orders, the Court stated:

> [T]he preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense.

212 U.S. at 351. Conversely, as the Court noted in *Insurance Corporation of Ireland*, 456 U.S. at 706, "[d]ue process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption."

At bar, First United's behavior does *not* support the *Hammond Packing* presumption because the March 1 order was invalid. First United's disobedience of the March 1 order to produce the nonresidents may just as likely be attributed to the invalidity of the March 1 order as it may be to any *Hammond Packing* presumption concerning the lack of merit of First United's defenses to Brockton's claims. It was precisely this ambiguity that led this Court to stress in *Hammond Packing*:

> In so deciding [that the default was properly premised on an adverse presumption about the merits] our conclusion is, of course, based upon the legality and sufficiency of the order to produce [evidence] . . . .

212 U.S. at 354. In premising its affirmance of the magistrate's March 1 order on the *Hammond Packing* presumption (App. 10a), the court of appeals failed to consider that the presumption, necessary to satisfy the Due Process Clause, is itself premised on the legality of the March 1 order. If the order was invalid, then "the be-

havior of [First United] will not support the *Hammond Packing presumption*," with the result that "[d]ue process is violated." *Insurance Corporation of Ireland*, 456 U.S. at 706.

This case exemplifies the due process difficulties presented by the court of appeals' analysis. First United could not have been aware of the "inherent power" of courts to order the appearance of witnesses beyond the scope of Rule 45(e)(1). Unlike the powers cited in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-65 (1980), no such inherent power to subpoena nonresidents beyond one hundred miles existed prior to the decision below. Even prior to adoption of the federal rules of civil procedure, the power of the federal courts to compel attendance of nonresident witnesses was circumscribed. *See, e.g.*, 2 R. Foster, *A Treatise on Federal Practice* § 342 (6th ed. 1920). This limitation has existed from the earliest days of the Republic. In *Henry v. Ricketts*, 11 F. Cas. 1189 (C.C.D.C. 1809) (No. 6,386), for example, the court refused to hold a witness in contempt for refusing to travel over one hundred miles from his residence in order to testify. This history, in addition to the present language of Rule 45(e)(1), demonstrates that there is no warrant for the creation by the court of appeals of a new "inherent power."

The court of appeals' opinion was influenced by a strong desire to defer to the magistrate's exercise of discretion.[10]

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[10] The court of appeals stated in note 7 of its opinion that the magistrate had a sufficient basis, apart from First United's failure to produce the nonresidents, for recommending a default judgment. (App. 14a). *But this was a finding that the magistrate did not himself make. See generally* App. 83a-110a. In National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642 (1976), this Court observed that a court of appeals should not decide whether it would have issued the contested sanctions, but should confine itself to a review of the district court's exercise of discretion. This principle, of course, must be applied evenhandedly, whether the effect is to uphold or overturn sanctions. The court of appeals should have

(App. 10a). Yet whether a district court has the power, inherent or express, to subpoena nonresidents, and whether severe sanctions for disobedience offend due process, are not matters of discretion. The creation of a new "inherent power" merely to uphold a particular exercise of the district court's discretion is subject to the same conceptual infirmities in the civil arena as is *ex post facto* legislation. If the court of appeals' ruling is sustained, litigants will have little if any notice concerning the true limits and scope of federal judicial power.

II. The Court of Appeals Substantially Limited the Scope of Post-Default Hearings to Assess Damages Pursuant to Fed. R. Civ. P. 55.

First United contended below that it was entitled to an evidentiary, post-default hearing to assess damages, pursuant to Fed. R. Civ. P. 55. First United would have sought to establish at such a hearing that some or all of Brockton's loss was proximately caused by Brockton's decision to ignore the FDIC's insurance limits by investing $1,000,000 in an essentially uninsured CD bearing an attractive 16% interest rate, as well as to address whether Brockton, a local savings bank, had complied with all laws and regulations governing such investments.[11] First United cited below those authorities that hold that, although a default judgment forecloses *liability* issues, it does *not* foreclose issues related to the existence *or scope* of the alleged loss. *See, e.g., Eisler v. Stritzler*, 535 F.2d 148, 153-54 (1st Cir. 1976); *Flaks v. Koegel*, 504 F.2d 702, 707 (2d Cir. 1974); *Trans World Airlines v. Hughes*, 449 F.2d 51, 70 (2d Cir. 1971), *rev'd on other grounds*

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required the magistrate to determine in the first instance whether there existed other sufficient grounds for his severe sanctions beyond disobedience of the March 1 order.

[11] Such investments are insured by the FDIC up to $100,000, the same amount of coverage afforded by the FSLIC, which insures deposits by Brockton's customers.

sub nom. Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973). First United also argued that it was entitled to establish the portion of Brockton's loss attributable to Peat Marwick's conduct. *See, e.g., Gulf Coast Fans, Inc. v. Midwest Electronics Importers, Inc.*, 740 F.2d 1499, 1512 (11th Cir. 1985); *Fehlhaber v. Indian Trails, Inc.*, 425 F.2d 715, 717 (3d Cir. 1970) (degree of fault of joint tortfeasor went to extent of damages and was not admitted by default).

The court of appeals ruled that the causation issue was foreclosed, distinguishing *Hughes* on the ground that Brockton's *total* investment in Penn Square, plus interest and less FDIC reimbursements, was precisely ascertainable—that is, liquidated and certain. (App. 14a-17a). In so ruling, the court of appeals overlooked the novel issue raised at bar, namely whether a defaulted defendant is entitled to reduce otherwise liquidated and certain damages on the ground that the entire amount of such damages was not *caused* by the wrongful acts deemed established by the default.

It is true, as the court of appeals noted, that "there is no question as to the precise amount of Brockton's total losses *stemming from its investment in the Penn [Square] CD*" (App. 15a; emphasis added)—$1,000,000 less FDIC reimbursements plus interest. Nonetheless, there remains a serious question as to the precise amount of Brockton's total loss *proximately caused* by First United's alleged wrong. This causation issue is raised by Brockton's independent conduct, following the alleged misrepresentation by First United, in investing an amount greatly in excess of the FDIC's insurance limits. Thus, although Brockton's total loss may be liquidated and certain, that portion of its loss proximately caused by First United's misconduct is unliquidated and uncertain.

The court of appeals avoided the unique question presented by this case by noting that Brockton had *alleged*

that First United's conduct caused Brockton's total loss, and that Brockton's "allegations of fact must be taken as true. . . ." (App. 15a). Although it is true that the well-pleaded, factual allegations of the complaint are taken as established by a default, allegations relating to damages are excepted from this rule, and inquiry as to them is not foreclosed. *Eisler v. Stritzler*, 535 F.2d at 153-54. Brockton's allegation as to the cause of its loss is only *in part* a liability allegation. To the extent that Brockton alleged that First United's wrong caused it to invest at all, that fact may well have been established by the default. To the extent that Brockton alleged that *all* of its losses were proximately caused by First United's conduct, that allegation relates to the scope of damages and was not adjudicated by the default.

In *Hughes*, wherein a default was entered for refusal to attend a deposition, the Second Circuit enunciated this precise distinction:

> The default judgment proved the fact of the diversion (the injury) and its illegality. But to recover damages, plaintiff was necessarily required to establish that those damages were attributable to the diversion. *Thus, however well-pleaded the allegations that profits were diverted, plaintiffs in* Jones *could not avoid, to the extent necessary to establish the causal nexus for the recovery of damages, introducing evidence relating to the diversion alleged.* (emphasis added).
>
> * * * *
>
> [The master's] formulation that the "burden of establishing proximate cause is satisfied *as to liability* (emphasis in the original) if proximate cause is adequately alleged in the complaint" . . . is consistent with our own understanding of the law . . . .

449 F.2d at 70.

The question whether and to what extent a plaintiff's conduct contributes to its damages remains open after default, as a corollary of the general rule that proximate

cause as to damages is not foreclosed. For example, in *Hughes*, the impact of TWA's alleged failure to exercise reasonable diligence on the amount of its damages was examined at the post-default hearing to assess damages. *Id.* at 74-75. Similarly, allegations concerning TWA's alleged failure to mitigate its damages remained open for consideration. *Id.* at 75. The court of appeals' opinion below does not explain why, for example, a plaintiff's failure to mitigate would remain open only when damages are unliquidated, as in *Hughes*. Mitigation is just as likely to decrease the amount of liquidated and certain damages for which the defendant has been deemed liable by the default.

The effect of the court of appeals' ruling is perhaps best illustrated by example. If Brockton, after First United made its alleged misrepresentations concerning Penn Square's financial health, had invested its entire assets—clearly a liquidated amount—in a Penn Square CD insured to a maximum of $100,000, such lack of reasonable care by Brockton would be held to have caused a substantial part of its loss. It would surely be relevant to consider what proportion of its assets a reasonable local savings bank should invest in excess of the FDIC's insurance limits on the strength of a seller's representations, even though the seller might still be held liable for a portion of the total, liquidated loss.

All such inquiries are now foreclosed by the court of appeals' ruling. Indeed, if the court of appeals' opinion stands, as long as the total dollar amount of a plaintiff's loss is known, a defaulted defendant is now barred from reducing the damage award to less than the entire loss, even if a substantial portion of the loss is proximately caused by factors wholly unrelated to the defendant's conduct.[12]

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[12] This Court's reversal of the Second Circuit's decision in *Hughes* was on other grounds, leaving the causation issue raised at bar unresolved. *See* discussion of *Hughes* in 10 C. Wright, A Miller, & M. Kane, *Federal Practice and Procedure* § 2688 (2d ed. 1983).

CONCLUSION

For the foregoing reasons, First United respectfully prays that the Court grant its petition for a writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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85-1134

No. 85-

Supreme Court, U.S.
FILED
JAN 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FIRST UNITED FUND, LTD.,
Petitioner,

v.

BROCKTON SAVINGS BANK,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 85-1174

BROCKTON SAVINGS BANK,
Plaintiff, Appellee,

v.

PEAT, MARWICK, MITCHELL & CO., *et al.*,
Defendants, Appellees,

FIRST UNITED FUND, LTD.,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. David S. Nelson, *U.S. District Judge*]

Before

Coffin, Rubin* and Bownes,
Circuit Judges.

Edward R. Lev with whom *Louis A. Rodriques, Shelagh A. Ellman* and *Sullivan & Worcester* were on brief for First United Fund, Ltd.

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* Of the Fifth Circuit, sitting by designation.

Michael S. Greco with whom *Richard M. Zielinski*, *Robert D. Richman* and *Hill & Barlow* were on brief for Brockton Savings Bank.

August 26, 1985

COFFIN, *Circuit Judge*. This appeal raises two basic questions: first, whether the district court abused its discretion by entering a default judgment against defendant, First United Fund, Ltd. (First United),[1] for abuse of the discovery process, including the failure to comply fully with several discovery orders; and second, whether the district court erred by not considering questions of contributory or comparative negligence during a postjudgment hearing on damages.

I. BACKGROUND[2]

The underlying complaint in this action was filed on February 24, 1983. Plaintiff Brockton Savings Bank (Brockton) alleged that First United, a securities broker-dealer, had acted so as to mislead Brockton into purchasing on April 28, 1982, a 90-day, $1 million Certificate of Deposit (CD) issued by Penn Square Bank, N.A. (Penn Square). Penn Square had failed shortly thereafter, causing Brockton to lose most of its investment. In its complaint Brockton charged that First United had led Brockton to believe that Penn Square had been investi-

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[1] Earlier in the litigation, the district court granted a motion to dismiss separate claims that had been brought against codefendant Peat, Marwick, Mitchell & Co. Since no challenge to that dismissal has been made, Peat, Marwick is not a party to this appeal.

[2] This summary of the facts and procedural history is drawn in the main from the magistrate's report of May 14, 1984, which was adopted by the district court on August 9, 1984. A few details not mentioned in that report are drawn from the record, as submitted by the parties.

gated thoroughly and that its CD was a sound investment. Brockton alleged that no such analysis had been performed and that, had one been, First United would have known that the CD was not a sound investment. On the basis of these and other allegations, Brockton charged that First United had violated federal and state laws governing securities transactions, as well as state laws covering intentional and negligent misrepresentations.

At the same time that Brockton filed its complaint, it also filed a set of interrogatories and a request for the production of certain documents. For the purposes of this appeal, only a few of those interrogatories and requests for documents need concern us. First, Brockton requested that First United identify and produce copies of all original solicitation letters sent to prospective purchasers and sellers of CD's. Second, Brockton requested that First United identify all banks for which it brokered CD purchases and sales. Finally, Brockton requested that First United identify and produce all documents concerning business transactions between First United and Penn Square.

First United's initial response, at the end of April 1983, was to answer partially the interrogatories, to produce a few documents, including one undated and unaddressed "form" letter, and to register several general objections. The most significant objections were that Brockton was requesting material unrelated to its claims, that much of the material was confidential, and that to produce it would be unduly burdensome.

A motion to compel discovery followed on May 10, 1983. In its accompanying memorandum of law, Brockton argued that what it was seeking was relevant because it was likely to show what First United knew or should have known about Penn Square's financial condition, to identify First United's standard brokerage policies and procedures, to show whether First United deviated from those policies and procedures in brokering the Penn

Square CD's, and to identify any other customers who were misled and thus to uncover witnesses who might testify on Brockton's behalf at trial. In its memorandum in response, First United continued to argue the irrelevancy of almost all that was requested and added that the transactions slips, those papers upon which were recorded either quotations to customers or confirmations of purchases, weighed "approximately 1500 pounds". Also, while admitting that no legal privilege protected the documents, First United continued to claim that its customers expected the documents to be kept confidential. Brockton replied that an appropriate protective order could be issued.

On August 18, 1983, a status conference was held before Judge Nelson. At that conference, First United was ordered to produce within ten days[3] a list of all Penn Square CD transactions that it had brokered. Thirty-five days later, First United produced a list of banks that it had serviced, omitting any reference to their addresses or to the types of CD's purchased. This was but the first of four instances in which First United's response to a court order was both untimely and partial.

Brockton renewed its motion to compel and the matter was referred to a magistrate. In the hearing that followed on October 18, 1983, First United continued to object to discovery on the grounds of burdensomeness and confidentiality. Brockton responded that it would undertake the burden of going through the requested documents at First United's offices in Long Island and that, if confidentiality were perceived to be a problem, First United needed only to accept the protective order

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[3] Although First United contests the magistrate's finding as to the ten-day deadline and no record was made of the conference, we have no real reason to doubt that such a deadline was set. Initially based solely upon an affidavit filed by Brockton's attorney, this finding has since been reviewed and adopted by Judge Nelson, who gave the order in the first place.

that Brockton had offered. First United gave no indication that it would accept that offer; nor did it request a protective order from the magistrate. At the end of the hearing, the magistrate granted Brockton's motion to compel. After consulting with First United to ensure that it would be given enough time to comply, the magistrate ordered it to produce supplemental answers by November 23, 1983, and the balance of the requested documents by December 5, 1983. To reduce First United's burden, he ordered that the documents be produced at its offices in Long Island, rather than in Boston.

On November 23, 1983, First United filed supplemental answers under seal but did not serve a copy of them on Brockton. First United also moved for a protective order to ensure the confidentiality of all the documents that a month earlier it had been ordered to produce. Brockton opposed the motion on the twin grounds that it came too late and that the proposed order was so broad that it would be used by First United to frustrate discovery in the future. There appeared to be reason for the latter concern, for in the supplemental hearing of December 2, 1983, First United represented that "virtually all of the documents that have been requested" were confidential, including the "confirmation slips, invoices, and letters". The magistrate rejected this argument and denied the motion, except with regard to the list of Penn Square transactions, which Brockton agreed could be kept confidential. First United subsequently appealed the denial of a broader protective order and filed for a stay of production of documents until Judge Nelson decided the appeal. The stay was granted. On December 5, 1983, twelve days late, First United served its supplemental answers on Brockton.

On January 18, 1984, Judge Nelson held a brief hearing and entered a one-sentence protective order requiring each party to use only for litigation purposes whatever information was provided by the other party. This pro-

tective order was much simpler than the one requested by First United and appears to have been responsive to Brockton's fears that First United's draft order would permit it to continuously challenge Brockton's discovery demands. Judge Nelson ordered First United to produce all requested documents within ten days and denied First United's request to produce only "exemplars" or "forms" of requested letters.

Although some documents were produced within the ten days, First United failed to produce all of the transaction slips that had been ordered and again submitted only form solicitation letters. Frustrated by this response, Brockton filed a motion for sanctions, including judgment by default, an order of contempt, and an award of attorney's fees. On February 16, 1984, twenty days late, the balance of the transaction slips was produced. Also on February 16, First United's attorney, by letter, suggested to Brockton for the first time that copies of the actual letters of solicitation did not exist.

This new information came to the court's attention on March 1, 1984, when the magistrate held the first of several hearings on Brockton's motion for sanctions. At that time, the magistrate was handed the affidavit of an "Executive Secretary" of First United, in which she stated that only eight form letters were used to communicate with prospective customers and that only these letters and lists of customers and their addresses were retained in First United's word processor; she claimed that no copies of letters actually sent were retained anywhere in First United's offices. The magistrate was startled by this information for two reasons: first, it did not accord with the fact that First United's attorney for months had been protesting the confidentiality of documents such as these and the burden of producing them; and second, the actual solicitation letter produced by Brockton from another First United customer, on First United's letterhead, was in significant part different from the form letters that First United had produced.

Faced with these discrepancies, and concerned that either documents had been destroyed or the court and Brockton had been purposely misled for a period of several months, the magistrate ordered First United's attorney to have the affiant-secretary and First United's president appear in court five days later. Although unsure of the president's schedule, First United's attorney gave no indication that either the president or the secretary would be unwilling to appear.

When the hearing was continued on March 6, 1984, however, neither the secretary nor the president did appear. Initially, First United's attorney thanked the court for having given the opportunity to produce live testimony concerning the motion for sanctions but then stated that First United chose to stand on the record as it existed. When informed that the witnesses' appearances had been ordered, not requested, the attorney answered, "[M]y client chooses not to obey." When asked about the secretary, the attorney answered that he had not spoken with her because he did not realize that he should have. Perceiving no end to First United's unsatisfactory compliance with the court's orders and no willingness on First United's part to take advantage of the opportunity to persuade the court that the requested sanctions were inappropriate, the magistrate closed the hearing by stating that he intended to recommend to the trial judge that the severest sanctions be imposed.

On March 16, 1984, First United retained new counsel. On March 19 and 21, additional hearings were held to give new counsel an opportunity to change the magistrate's mind. Counsel's efforts did not succeed, however, and on May 14, 1984, the magistrate issued his report recommending the entry of default judgment and award of costs and attorney's fees against First United. These recommendations were based on the magistrate's findings that First United had

> "wilfully disobeyed the discovery orders of this court; . . . either misled the court and the plaintiff through malice or incompetence as to the existence of the [solicitation letters]; . . . deliberately refused to appear and testify when ordered to do so with reference to this late dubious claim of non-retention; and . . . abused and frustrated the discovery process at great cost to the plaintiff and the court."

On August 9, 1984, the district judge adopted the magistrate's report and ordered a hearing to determine the amount of the default judgment.

That hearing was held in January 1985. The magistrate allowed evidence only as to the computation of Brockton's total loss. He refused to allow discovery or introduction of evidence as to any negligence on the part of either Brockton or codefendant Peat, Marwick, Mitchell & Co. that might have contributed to Brockton's total loss. Upon the agreement of counsel solely as to the accuracy of the computations performed by Brockton, the magistrate recommended that judgment be entered for $783,868.63. Judge Nelson entered judgment for that amount on January 29, 1985.

II. DISCUSSION

A. *Authority of District Court to Enter Default Judgment*

The above, brief summary reveals a most lamentable display of recalcitrance, evasiveness, and disobedience on the part of First United and its then counsel. Its new counsel, in an effort to offset what transpired before it took over the case, has mounted a straightforward technical legal challenge to the court's power to order the president and affiant-secretary to appear. It argues that the validity of the March 1, 1984, oral order to produce these two individuals must rest on Rule 45(e)(1) of the

Federal Rules of Civil Procedure, which restricts a court's authority to issue subpoenas "requiring the attendance of a witness at a hearing or trial" to subpoenas that may be served within the forum district or a place outside the district but within 100 miles of the place of hearing or trial. The place of business of First United's president and the secretary being at a farther remove (Garden City, New York), the argument is made that the order was a nullity and any sanction partly based thereon is without validity.[4]

First United also argues that although the sanctions of Rule 37 of the Federal Rules of Civil Procedure would have been available had the magistrate compelled First United's president and secretary to appear in the forum for a deposition, what the magistrate ordered was their appearance at a "hearing", an event specifically governed by Rule 45. Because it was one of several grounds—and a significant one—relied on by the district court in imposing the sanction of default judgment, First United contends that the default judgment must be reversed or the case must be remanded for reconsideration.

In considering this argument, we observe at the outset that how one characterizes the challenged court action probably determines the result one reaches on this issue. If one begins with the assumption that the court's order of March 1 is in reality a "subpoena requiring the attendance of a witness at a hearing or trial" pursuant to Rule 45, the cases cited by First United make clear that a court cannot force the appearance at a hearing or trial of a witness beyond the court's subpoena powers. *In re Guthrie*, 733 F.2d 634, 637 (4th Cir. 1984); *Jaynes* v. *Jaynes*, 496 F.2d 9, 10 (2d Cir. 1974); *GFI Computer*

[4] It is interesting to note that this technical objection was not raised during the sanction hearings of March 1, 6, 19, or 21. Not until more than twenty days after the witnesses' failure to appear did new counsel think to bring this point to the magistrate's attention in a post-hearing brief.

Industries, Inc. v. *Fry*, 476 F.2d 1, 5 (5th Cir. 1973); *Steel, Inc.* v. *Atchison, Topeka & Santa Fe Railway*, 41 F.R.D. 337, 339 (D. Kan. 1967).

We, however, approach this critical threshold task of characterization with an instructed bias to defer to the district court's view of the situation and, within reason, to accord that court wide discretion. *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976); *Damiani* v. *Rhode Island Hospital*, 704 F.2d 12, 17 (1st Cir. 1983). Here, the court was greatly disturbed by what it termed a "most egregious" negation of the basic assumption underlying this litigation. In its view, documents whose production had been steadfastly resisted on the grounds of irrelevancy, burdensomeness, and confidentiality were suddenly and inexplicably described as nonexistent. This volte-face obviously gave rise to a permissible adverse inference, *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, 350-51 (1909), that the long sought documents had been destroyed or that First United had otherwise flagrantly misled the court or disregarded its orders. *Cf. Emerick* v. *Fenick Industries, Inc.*, 539 F.2d 1379, 1381 (5th Cir. 1976) (continued "flagrant disregard" of court's order to produce "ledgers and journals" not expiated by subsequent disclosure that the only business records kept were computerized printout summaries).

So regarding the situation, the court could have, as in *Emerick*, entered a default judgment under Fed. R. Civ. P. 37(b)(2). Instead, it opted to defer its ruling to accomplish three purposes: to give an opportunity to appellant to explain and justify its latest position, to give an opportunity to Brockton to cross-examine, and to enable the court itself to make inquiries. This scenario is precisely that which the appellee urged upon the court of appeals for the Fifth Circuit in *GFI Computer Industries, Inc.* v. *Fry*, 476 F.2d at 3-5. In that case a default judgment had been entered against appellant, a resident

of the Bahamas, for failure to obey an order of the court directing him to appear, remain, and testify in a Dallas, Texas, proceeding. The district court had entered its order because of its finding that appellant had refused to comply with court orders and evaded multiple discovery obligations. The court of appeals, after determining that the district court had an erroneous view of the facts, held:

> "The theory that the court was only benefitting [appellant] by ordering him to do what he could not otherwise be required to do, as a condition to avoiding a default judgment to be imposed for his earlier defaults, falls with the determination that the court's basis for entering the order in the first instance was a misapprehension of the relative responsibilities of the parties for the breakdown in discovery." *Id.* at 5.

In the case at bar there was no misapprehension on the part of the court as to who bore the responsibility for the breakdown in discovery.

We therefore must accept or reject the legal validity of the predicate which the Fifth Circuit found was not factually established in *GFI*. We accept it. In so doing, we do not characterize the district court as acting under Rule 37, although one might analogize the ordered appearance to compelled attendance at a depositional hearing. *See, e.g., First National Bank* v. *Western Casualty and Surety Co.*, 598 F.2d 1203, 1205-06 (10th Cir. 1979) ("depositional hearing" conducted by magistrate to resolve discovery impasse reached during initial deposition is not a "hearing" in the Rule 45(e)(1) sense of that word). Rather, we view the district court as having acted to vindicate the integrity of a proceeding which it had been managing for more than a year.

That the rules of civil procedure do not completely describe and limit the power of district courts seems to us long established, although only infrequently documented—

possibly because the rules do take care of most situations. In *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980), the Supreme Court recognized that among the inherent powers of federal courts (those "necessary to the exercise of all others", *id.* at 764 (quoting *United States* v. *Hudson*, 7 Cranch 32, 34 (1812)) was, "in narrowly defined circumstances, . . . [the] inherent power to assess attorney's fees against counsel." *Id.* at 765. The authority to hold a party in contempt is another. *Id.* at 764. Still another is "the authority of a court to dismiss *sua sponte* for lack of prosecution". *Link* v. *Wabash Railroad*, 370 U.S. 626, 630-31 (1962).[5] Perhaps even closer to the power invoked in this case is that invoked in cases where fraud has been perpetrated on the court, even when the relief given is the vacation of a judgment long after it has become final. *See, e.g., Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 244 (1944); *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 580 (1946); 7 J. Moore & J. Lucas, Moore's Federal Practice ¶ 60.33, at 60-349—362 (1985).

In all of these instances, the inherent power is said to be "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases". *Link* v. *Wabash Railroad*, 370 U.S. at 630-31; *see generally* 1 J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, Moore's Federal Practice ¶ 0.60[6], at 633-37 (1985). A federal district court must be able "to protect the administration of justice by levying sanctions in response to abusive litigation practices." *Penthouse International, Ltd.* v. *Playboy Enterprises, Inc.*, 663 F. 2d 371, 386 (2d Cir. 1981).

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[5] We long ago recognized "the inherent and necessary power of courts of general jurisdiction to protect members of the public from vexatious suits through an exercise of the right to dismiss frivolous proceedings. . . ." *O'Connell* v. *Mason*, 132 F. 245, 247 (1st Cir. 1904).

It seem to us central to the functioning of a court that it be able *sua sponte* to explore directly and promptly the truth and circumstances of the averred disappearance or "non-retention" of long-assumed existing evidence and to impose sanctions for the unexplained refusal to permit such exploration. Such power is just as essential and just as reasonable as the powers to dismiss for want of prosecution, to hold parties or counsel in contempt, to dismiss frivolous cases, or to vacate judgments procured by a fraud on the court.[6] Great deterrent value is to be derived from the imposition of sanctions for such abusive litigation practices, *National Hockey League* v. *Metropolitan Hockey Club*, 427 U.S. at 643, and there is, contrary to First United's position, no requirement that other sanctions be first considered or tried. *Damiani* v. *Rhode Island Hospital*, 704 F.2d at 15.

We are mindful of the teaching that "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Roadway Express, Inc.* v. *Piper*, 447 U.S. at 764. We realize that too cavalier a resort to "inherent powers" could result in subverting or trivializing the rules of procedure. But in this case the history of evasiveness and intransigence, the centrality of the evidence at issue, the lack of explanation for the sudden revelation of its "non-retention", the obvious seriousness with which the magistrate viewed the issue, his avowed purpose to offer First United the opportunity to explain and justify the lateness of the revelation, the implicit agreement of counsel to produce the requested witnesses and the giving of a continuance to facilitate their production, and the final con-

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[6] That such an exploration, involving the production of witnesses beyond the court's subpoena power, would not be vulnerable to a basic attack as beyond the court's jurisdiction over the persons involved seems established. *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

tumelious ipse dixit that counsel for First United had "nothing more to say than that it was his client's decision" not to appear and his client's decision not to permit the appearance of its employee-affiant all conjoin to justify inclusion of the failure to appear as one of several grounds supporting the entry of a default judgment. The district court acted well within its discretion, therefore, in entering such judgment.[7]

B. *Adequacy of Damages Hearing*

First United's second claim is that the magistrate erred by not expanding the scope of the damages hearings to allow evidence as to the extent to which Brockton's total losses were caused not by First United's conduct, but rather by that of Brockton or codefendant Peat, Marwick, Mitchell & Co. In other words, First United argues that the magistrate erred by limiting inquiry to the mere arithmetical computation of Brockton's damages.

First United relies principally upon *Trans World Airlines* v. *Hughes*, 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973), a complex antitrust case involving a multimillion dollar claim for lost profits,

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[7] As an aside, we reiterate that even if the order to appear were invalid, First United's failure to obey earlier orders, its tactics of delaying discovery, and its failure to reveal the non-existence of the solicitation letters earlier, would by themselves justify default judgment. That the magistrate was ready to recommend this most severe sanction before he ordered the president and affiant to appear is clear from the transcript of the March 1 and 6 hearings. That First United chose not to take advantage of the opportunity to explain its actions because, as it argued at one point, it felt the magistrate had already made up his mind, reveals not only a lack of judgment and willingness to exhaust remedies but also full awareness that the magistrate was prepared to impose the severest of sanctions if First United did not give a complete explanation of its prior conduct.

which we find to be entirely inapposite.[8] The court there explained that it was the "unliquidated and uncertain" nature of the alleged lost profits that necessitated the holding of a hearing and that the hearing was to be limited to a determination of whether profits had actually been lost and the extent to which any such loss was attributable to the violations established by the default, rather than to causes beyond the scope of the suit. *Id.* at 70.

Here, by contrast, there is no question as to the precise amount of Brockton's total losses stemming from its investment in the Penn Charter [sic] CD—$783,868.63, including pre-judgment interest, as of the time the default judgment was entered.[9] Brockton arrived at this figure by doing simple arithmetical computations, which have gone unchallenged by First United. Under these circumstances, the brief hearing that the court held on the computation of damages was more than sufficient. *Cf. Dundee Cement Co.* v. *Howard Pipe & Concrete Products, Inc.*, 722 F.2d 1319, 1323 (7th Cir. 1983) (hearing unnecessary where "the amount claimed is liquidated or capable of ascertainment from definite figures contained in the documentary evidence or in detailed affidavits").

Moreover, there is no question that, default having been entered, each of Brockton's allegations of fact must be taken as true and each of its seven claims must be considered established as a matter of law. *Id.* Since one of Brockton's claims was that First United intentionally misrepresented certain facts and thereby caused

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[8] We note that Fed. R. Civ. P. 55(b)(2), which governs the matter of a damages hearing for a default judgment, says only that the district court "may conduct such hearings . . . as it deems necessary and proper. . . ."

[9] This amount is less than Brockton's original $1 million investment because Brockton received certain reimbursements from the Federal Deposit Insurance Corporation ("FDIC").

Brockton's total loss, and since "[t]he general rule is that contributory negligence is a defense only to actions grounded on negligence", *Curry* v. *Fred Olsen Line*, 367 F.2d 921, 928 (9th Cir. 1966), we find no merit in the argument that First United should have been allowed to prove that Brockton's conduct contributed to its damages.[10]

As for Peat, Marwick, Mitchell & Co., its motion to dismiss the five separate claims brought against it was granted long before the damages hearing was held, and we find no indication in the record that First United ever brought any cross-claims against Peat, Marwick. There was therefore no reason to consider how Peat, Marwick's conduct might have contributed to the damages. Moreover, even if these claims had not been dismissed, they were substantially different from the seven claims brought against First United, both in form and substance. Thus, First United's reliance upon cases such as *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1262-63 (2d Cir. 1980), which involved a single claim against multiple defendants, is misplaced. There the concern was that two distinct damage awards might result "on a single claim involving joint and several liability." *Id.* at 1262. Here, because there were different claims against the two defendants, based on different

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[10] Although First United assumes at one point that New York's law might apply and refers us to that state's provision governing contributory negligence, N.Y. Civ. Prac. Law § 1411 (1975), we find nothing in that provision to suggest that it would be applicable where the defendant has been found liable for an intentional tort. *See, e.g., Leiner* v. *First Wythe Avenue Service Station*, 121 Misc.2d 559, 468 N.Y.S.2d 302, 305 (N.Y. City Civ. Ct. 1983) ("Where the tort complained of does not allow for a defense of contributory negligence, the adoption of CPLR 1411 will not be the instrument of its creation."); *Clark Operating Corp.* v. *Yokely*, 120 Misc.2d 631, 466 N.Y.S.2d 204, 205 (N.Y. City Civ. Ct. 1983) ("The duty of mitigation is not required in the case of intentional or malicious injuries.").

alleged acts and omissions, different determinations as to either liability or damages would not necessarily be inconsistent with one another. *See generally*, 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 55.06, at 55-41—42 (1985).

Accordingly, we conclude that the entry of default judgment was proper and that the inquiry solely to determine the amount of damages was procedurally sufficient.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 83-0478-N

BROCKTON SAVINGS BANK

v.

PEAT, MARWICK, MITCHELL & Co., *et al.*

BEFORE: Magistrate Robert DeGiacomo
PLACE: United States District Court
DATE: October 18, 1983

APPEARANCES

Richard Dahley [sic], Esq.
Michael S. Greco, Esq.

[3] UNIDENTIFIED VOICE: This is the case of Brockton Savings Bank v. Peat, Marwick, Mitchell & Co., et al.

THE COURT: I've read what's been submitted. I note at least there is partial agreement in that the date, as set forth in the memorandum in support of the plaintiff's motion to compel discovery, on the time frame, has been reduced. January 1, 1978 was chosen in order to cover the entire period of Penn Square Bank's financial problems. However, since First United was not incorporated until in or about January, 1980, the Brockton Bank moves to compel discovery, only with respect to the period January 1st, 1980, to December 31st, 1982

MR. DAHLEY [sic]: Your Honor, may it please the Court, my name is Richard Dahley. I'm here appearing for First United. I should advise Your Honor that there is no issue really as to dates. We'll provide documents for the entire range of First United's existence.

THE COURT: Well, perhaps I better hear from you then on the whole matter of your objections.

MR. DAHLEY: Well, the difficulty here is with the subject matter. As we read their document [4] demand, they seek all documentation as to all similar transactions between First United and any certificate of deposit issuing bank and any certificate of deposit purchasing bank.

THE COURT: Well, they're making fairly serious charges against you, your client rather. And as I understand it, the case they claim is that your client well knew the condition of the bank in question when your client recommended to the plaintiff in this case that this certificate of deposit be purchased and they are seeking to determine what your policies and procedures were since you denied this with reference to your sales and review of banks where you recommended purchases and sales take place.

MR. DAHLEY: Well, Your Honor, I quite agree that it's a serious charge and you've made a fair statement of it, but our difficulty is that we do nothing but quote—my client does nothing but quote rates on certificates of deposit, and in that sort of unusual kind of transaction—

THE COURT: You don't concern yourself with from when the certificate of deposit comes?

MR. DAHLEY: Well, as I understand it, [5] First United's policy and procedure is to make sure that a bank issuing a CD is insured by the Federal Deposit Insurance Corporation.

THE COURT: And that's the end of it?

MR. DAHLEY: And, in most cases, to obtain their financial statement.

THE COURT: And what about the other cases? You said, "in most cases".

MR. DAHLEY: Well, in this case they did.

THE COURT: Well, I think someone attached a copy of an aspect of a Congressional Hearing to one of these papers.

MR. GRECO: Yes, Your Honor. I have a copy of it here. Another copy of it is here, if I can hand it up.

THE COURT: Well, no. It must be in the papers. My memory of what was attached is that it concerned some rather pointed questioning by the chairman of that committee on knowledge on the condition of the bank.

MR. DAHLEY: Well, Your Honor, with respect to the condition of Penn Square, we're willing, in fact we have given them all of the documentation that relates to First United's dealings with them.

[6] THE COURT: I'm sure you have but they're interested in finding out what your policy, general policy was in your business as to what you knew or what your client looked for with reference to the financial security involved. As I gather it, the plaintiff is saying that when they got the quote from you or your client on this certificate of deposit, they relied on you and purchased it and in a matter of weeks the disaster struck, the deluge, it ended. And they say, "Well, how can you quote things?" and that's what the chairman of the Congressional Committee said. How can you do this? And this is what they want to find out. Now maybe there's nothing to it. Maybe it's perfectly all right; but I find it difficult to limit discovery on the arguments raised by you in that area.

MR. DAHLEY: Your Honor, if their demand for producing this is confined to documents we have concerning our investigation of banks other than Penn Square, they've already gotten Penn Square documents. That is something we can live with. We don't have a problem with that. The problem we have, and it's much more a business problem and a practical problem than a legal

problem, is that they [7] appear to be looking for all of the transaction records of banks that we were quoting CD's to, not banks whose CD's we were quoting, but banks that actually did business based on our quotations and that is a problem because the bank issuing the CD and the bank buying it is expecting a certain degree of confidentiality, first. The second thing is, that's a lot of paper. That's all of our business records relating to everyday—

THE COURT: Well, how much paper is it?

MR. DAHLEY: Fifteen hundred pounds, Your Honor.

THE COURT: Well, did you take them out and weigh them?

MR. DAHLEY: No, it's an estimate.

THE COURT: Well, how do you know?

MR. DAHLEY: We know that by the number of banker's boxes. You weigh one and you multiply.

THE COURT: And banker's boxes have a standard weight? I'm not familiar with banker's boxes.

MR. DAHLEY: They do, Your Honor.

THE COURT: They do. So there's, other than weight—

[8] MR. DAHLEY: It's a massive volume of paper and it's all—

THE COURT: It's all there? It's all in the boxes?

MR. DAHLEY: I assume it's all in files or in boxes in Long Island.

THE COURT: Well, then you have no problem. The problem is theirs.

MR. DAHLEY: Well, I think they certainly have a problem; but in an effort to reduce the thing, we would certainly reduce the scope of this thing. We would certainly give them documents that we have that relate to our investigation of other banks, which will, I believe, demonstrate that we did about the same thing with everybody else that we did with Penn Square. The reason that we—

THE COURT: That's the problem. You say, "most of the time". You say, "about what we did". That's really what the search for admissible evidence is all about, not what happens most of the time, but what happens sometimes that might have pertinence to this.

MR. DAHLEY: Your Honor, I'm offering to give them each single time we investigate at a [9] bank, to the extent we investigated it. The reason we didn't investigate further is really very clear, Your Honor. The FDIC insures these things.

THE COURT: I'm glad it is. The FDI what?

MR. DAHLEY: The FDIC insures these transactions to the extent of $100,000 and that is—

THE COURT: That's not much help if you're selling something worth a million, is it?

MR. DAHLEY: No, Your Honor, nor is it if somebody wants to buy something worth a million.

THE COURT: No. You know if all a customer needed to do, it seems to me, was to find out whether or not the bank was insured up to $100,000, then they really wouldn't need you, your client.

MR. DAHLEY: They don't need us for that and they don't rely on us for that, Your Honor. What they want from us and what we give them is the daily quotation of the rate a given bank is offering. We serve in this industry the same function as the stock table in the Wall Street Journal. That's all they look to us for.

THE COURT: All right.

MR. DAHLEY: And in this case, they made an— Brockton Savings independently investigated [10] Penn Square.

THE COURT: Mr. Greco. On this point and then we'll get back to it.

MR GRECO: Yes, Your Honor, if I may. To be sure, there have been some very serious allegations made by the plaintiff with respect to representations made by Mr. Dahley's client on or about April 28, 1982. But for the telephone call from First United's representative, Mr.

Schoefield, to the Brockton Saving's [sic] Bank, in which certain representations were made, the Brockton Saving's Bank has alleged in its complaint, would not have purchased the $1,000,000 CD. What information did First United Fund communicate on April 28, 1982?—the following, that Penn Square Bank is one of our banks; that Penn Square Bank's financial condition is strong; that the purchase of this $1,000,000 jumbo CD is a good risk; that we, First United Fund, have investigated independently our own service, which we provide to buyers such as you. We have done this analysis, this investigation and the interest rate—Penn Square is paying out 16% is 200 basis points higher than anyone else in the country. This is a good deal. Jump at it. You [11] only have a limited time. And those representations, Your Honor, which are included in the complaint, have been denied by the defendant, First United Fund. Denied and not only that but when we asked for documents and interrogatories that have to do with what kinds of representations do you make to other buyers. What kinds of services do you say to other buyers that you provide? Have you told other buyers that you do an independent investigation? Have you told other sellers that you will say X, Y, and Z to a buyer? What is your modus operandi?

THE COURT: And what does the record show?

MR. GRECO: Well, Your Honor, we have one of the 48 sheets of paper that First United Fund has produced and 17 of those sheets were American Banker articles, which reduces the figure down to about 30 pieces of paper and out of those 30 pieces of paper, one was a brochure, so that of the remaining say 10 pieces of paper, 2 or 3 start to indicate what was going on and what lays beneath the surface. If I may, Your Honor, I'd like to hand you one document produced by First United during the limited discovery that they've [12] done. This is a letter, Your Honor, which really belies the denials made by First United Fund in their answer and belies the posi-

tion they've taken in their interrogatory answers. If I can just read you two sentences from it. This is a letter produced in discovery, apparently sent by First United Fund, generally to prospective purchasers to solicit them, to induce them to buy instruments; and included in this letter, Your Honor, are statements such as this: "Dear Blank: We would like to bring your attention to a CD investment program designed to give (blank) you greater returns on your Certificate of Deposit. First United Fund represents over 200 government insured commercial banks and thrift institutions." I'm going to skip three lines. "In 1981 First United Fund administered over one and one-quarter billion dollars in certificates of deposit in this program. Our company is registered with the United States Securities and Exchange Commission as broker-dealers. We are members of the Securities Investors Protection Corporation and carry SITC insurance." Parenthetically, Your Honor, both of those statements have been denied in the answer. I'm going to skip another partial sentence [13] and then read, "We are retained by banks and thrifts throughout the country to negotiate terms and rates for deposits in their institutions." And here is the single-most important statement that they have provided us in discovery, Your Honor. "Before First United represents a banking institution, our investment committee conducts a complete financial analysis."

Your Honor, that's the nub (phonetic) of this case. That's what we say they said to Brockton Saving's [sic] Bank on April 28th, which they've denied. That's what we want to find out whether they said to other buyers and if they said that to other buyers, then why did they deviate from Brockton Saving's Bank. If they've said it to other buyers and other buyers similarly took a bath, not only in the Penn Square fiasco, but there are other banks that are folding, and First United, our information is, brokered instruments of other banks that have folded. There is a running roster of law suits around

the country, Your Honor. We know of one definite other case involving First United Fund as a defendant; there may be others. This is one of the biggest fiascos in banking history. Congressional hearings have been held. On [14] September 30, 1982, Mario Renda (phonetic), president of First United Fund, as you noticed, gave testimony; and what is extremely significant about that testimony, Your Honor, is this. The chairman of the committee said, "Mr. Renda (phonetic), did you read an article in April of 1982?" It turns out, Your Honor, that that article was printed in the American Banker on April 26, 1982. Mr. Renda (phonetic) said he read it.

THE COURT: Yes.

MR. GRECO: He said he called his downhome friend in Oklahoma, who gave him assurances, and yet, Your Honor, in our interrogatory answers and documents, there was no reference to that conversation of Mr. Renda (phonetic), no production of that April 26th, American Banker article, no indication of whatever, other than the simple statement, "As of April 28, 1982, First United Fund had no reason to think that Penn Square was other than a good risk." Your Honor, there is something going on here and if it's fifteen hundred pounds of paper which is my burden, I will gladly undertake that burden because there may be contained in those documents, and if they will answer the limited [15] interrogatories we've asked, Your Honor, we may get to the bottom of this. That, I think, I hope, is responsive to the question you just put.

THE COURT: It is.

MR. DAHLEY: Well, Your Honor, there isn't any running roster of cases against First United around the country. There is one other case involving allegations roughly similar to this one, venued in Oklahoma City. I think that—

THE COURT: Well, I think that they're entitled to look at what your policies are, since you've put them on the line; and it seems to me that it's appropriate that

they want to take on the burden to examine it. You have it all segregated. You have no problem with—

MR. DAHLEY: Your Honor, we don't have it all segregated. What they're asking for, if Your Honor reads their rather poorly-drafted document demand, is every piece of paper ever used in our business. I'm perfectly happy to bring to Boston and copy for them all documents indicating how we investigated any other banks, if that's what they're looking for; but documents that relate to every transaction we've had with every bank can't [16] possibly be relevant. They're not even collateral proof of fraud. If we have a transaction slip showing that we did a Bank of—we sold a Bank of Boston CD to a bank in California, selling is not quite the right word, if we quoted a Bank of Boston CD to a bank in California in November of 1982, that isn't going to help them prove that we were doing anything nasty. It's just going to show that we quoted a Bank of Boston CD to a bank in California. It cannot possibly lead to the production of admissible evidence.

THE COURT: Well, I agree. In isolation, that's meaningless but with what goes forward following that or before that, you could have very valuable information. I think it's important that they be able to determine, unless you want to submit it, they be able to determine what were your policies with reference to your clients, your banking clients with whom you did business throughout the country.

MR. DAHLEY: That we're perfectly happy to give them. If they want general statements of policy, rules by which the company operates, they can have that.

[17] THE COURT: And then they would like to see how you carried it out. You see I think that you better make a beginning on this and start producing something that goes to the point. I don't think—I think you're sidestepping it, frankly, at this time. I think what's been requested is relevant. Now, you say it's too much; you're going far afield. If you can show me how some aspects

of what have been sought really have nothing to do with what you yourself have put in issue in denying the allegations, then that's different situations. You know the—I don't have to tell you people how broad this is, this type of discovery. You're well aware of that. This happens to be the first time I've seen this case. That means that absent unusual circumstances, we're going to live together on the pre-trial of this—pre-trial discovery procedures of this case until it's ready to go to trial, absent unusual circumstances. So you're going to be coming back in here, as your brother and sister are, you don't get along to see me periodically; and we might as well make a beginning. You just can't argue some of these things in a vacuum. I'm willing to try to limit, [18] if limitation is necessary, any type of discovery. I'm well aware of the abuses of the discovery process and as you'll find out, if you abuse the discovery process before me, I'll impose sanctions without looking at you twice; and I don't say that as a threat; I say that's just the way it is. I rely on counsel to run the case properly. Now with reference to discovery, I'm perfectly happy at any time to sit down with counsel when there are discovery problems. All you have to do is ask for a discovery conference, if you can't get along. You don't have to file paper; you don't have to file motions. All you have to do is ask for a discovery conference and I'll talk with you. I'll find time to talk with you. The whole purpose of this is to get this case on the table so that if there is a case—then maybe you'll settle it or if you can't agree on it, you'll go to trial and if there isn't a case, then you'll get that information quickly enough and the whole thing will disappear. So in brief, my positions on discovery are that I think that the stronger case has been made with what I know about this by the requesting party and I think they're entitled to look. I think they're entitled [19] to examine the papers that you have on your dealings with other banks. I think they're entitled to examine what you told other banks, your clients, and what other banks did based on that

advice. What was purchased, what was sold, and what was the result.

MR. DAHLEY: Well, Your Honor, so that they don't put us out of business, may we at least have that inspection conducted on Long Island where the paper is?

THE COURT: Well, I think that as long as you have this much involved, I would suggest that that be appropriate.

MR. GRECO: Your Honor, I have no objection to that. I think it might be a little cumbersome for us to go down to Long Island and then we have some disputes. I would like to say one thing.

THE COURT: Well, if you have any disputes, don't go running into the Southern District. Just adjourn what you're doing on them and come up here.

MR. GRECO: The suggestion I have, Your Honor, is this. Included in our document requests definitions and interrogatories, is the request that if they isolate certain documents—

[20] THE COURT: You may not need the rest.

MR. GRECO: No, I'm saying that if they do that, if we knew before we went down there that they have 50 or 100 pieces of paper for which they're claiming privilege, we've asked that they identify those. If they could do that for us in the coming week, let's say—

MR. DAHLEY: Not possible, Your Honor.

MR. GRECO: Two weeks. Now, we've waited eight months with nothing—

MR. DAHLEY: Your Honor, I'm on trial in Florida until the middle of November. It's just simply not possible.

MR. GRECO: I'm not insisting, Your Honor, on anything unreasonable. I'm saying in terms of spending the bank's money; and when we're talking about the Brockton Saving's [sic] Bank, we're talking about a lot of individual depositors who stand to lose up to a million dollars, I don't want them to incur any unnecessary legal expense, as two or three trips down to Long Island would entail.

That's why I say if Mr. Dahley will identify for me and the Court any documents that they are not going to produce and just answering our definition G I think it is, that [21] would, I think, assist us so that when we go down there, we'll know what either we brought that list to Your Honor's attention so that we can clear it up, and we will be—either produce those things or not produce those things, as the case may be. But instead of having two or three or four runs back and forth, I'm willing to go to Long Island but under some direction from the Court.

THE COURT: Well I assume that Mr. Dahley knows what's in, what the documents are.

MR. DAHLEY: Your Honor, as I read their document demand, they want every piece of paper in our offices.

THE COURT: Well, no. I don't think they do. I don't think they do and if they do, they shouldn't have (inaudible) that they're not going to get it. I don't think that they want every piece of paper in your office.

MR. DAHLEY: Well, we do only one kind of business, one single kind of transaction and they've asked for every piece of paper relating to every one of those transactions with every CD issuing bank and every CD purchasing bank and that's everything. There really isn't anything else. [22] I mean if your [sic] a milk man and you're driving a milk route and the only thing you do is sell milk on catch slips ,and somebody asks you for all the catch slips of every sale you made, they're asking you for everything that you've created. That's the problem we have here. I would be happy to give Mr. Greco everything that relates to our investigations of other banks. I would be happy to give him statistical information broken down, perhaps by bank or by size of bank, as to what transactions we've conducted since the beginning of 1980. That's something we can do. He doesn't have to go down to Long Island to get that. I can get that up here. I know what he's talking about there; but when

he asks for everything about every transaction between every one of this kind of bank and every one of that kind of bank, that's all we've got. That's my problem with this. I'm certainly not trying to be obstructive. I'm not trying to raise the legal fees of the Brockton Saving's [sic] Bank depositors any more than I'm trying to raise it of my client's shareholders.

THE COURT: All right. Just a moment. Now based on the two things that you've said, you're [23] willing, you have your hands on and you can produce and you can produce here. What more beyond on that—Bare [sic] in mind I'm not familiar with this. I haven't seen this. What would be step three?

MR. DAHLEY: Hundreds of thousands of transaction slips.

THE COURT: Well, wait a minute. Mr. Greco.

MR. GRECO: Your Honor, I note first of all that in the age of the computer that we have computer assistance here. Mr. Dahley has produced following an August 18th session with Judge Nelson, Judge Nelson said, "Let's take the first step because the longer journey begins with the first step. Identify, at the very least, those other transactions brokered by First United involving Penn Square." After I don't know how many weeks, Your Honor, we received from First United a list of transactions, which have been opaqued of the identity of the name of the bank, buying bank, so that we cannot do follow-up discovery, find out what were you told and so on so that it's a list which, if I have to rely on this—

THE COURT: Well, you're not going to have to rely on that. It's my position that you [24] should have a list of every bank they did business with and sold certificates of deposit. I have no problem with that at all and that's to be produced. The next item is that the investigations that you made with reference to the banks whose products you sold, anything that pertains to that to indicate what you did should be produced.

MR. GRECO: Your Honor, if I may just interrupt. I don't like to interrupt but I would like to point out if a careful reading of our document requests and interrogatories, I think will disclose that rather than asking for the moon and the sun and the stars and trying to really burden this defendant, we were very selective in the time period, which we contracted even further, in the categories of documents, in the issues that we're pursuing and I really don't believe that we're asking for every piece of paper. All I'm asking for is what's in those requests. If he will supply what's in those requests and then he says to me, "This request we're not going to produce because it asks for 50,000 pieces of paper.", again my response there would be Your Honor, I'm willing to undertake that burden. If it's a confidentiality problem that [25] First United Fund has, and I've offered a protective order which will limit review of those documents solely to trial counsel. I think I've tried in every fashion, Your Honer, to be reasonable in limiting the documents requested, in limiting the scope of the interrogatories, in offering protection on confidentiality, if that is an issue, and I just want to get going. It's been eight months, nothing has happened, let me get going because that's the way cases get resolved, either one way or another. So I would request that before my requests are limited any further, I've already done that Your Honor in good faith. I come to the court having done that process.

MR. DAHLEY: I disagree, Your Honor.

THE COURT: Well, that may be. That may be. Is there anything more that has to be said at this time because I see that this has to be disposed of.

MR. GRECO: There is one other motion, Your Honor, involving different defendants.

THE COURT: Well, I'm not talking about that, no. I have some interesting questions about that, but as far as the United and the production request is concerned, as you have limited it by date, [26] it is allowed. Now, if you have any trouble understanding what's meant by the

document request, you talk. If you can talk about it and solve it in any way you wish, that's up to you. Let me give you some advice, however, about privilege. If there's anything that you're going to claim privilege on in the production of these documents, identify the documents in your claim of privilege sufficiently so that the document can be understood as to what type of a document it is and what it does and what it purports to do; what does it contain; and under those circumstances, then claim your privilege.

MR. DAHLEY: Your Honor, I seriously doubt that there is anything more than the smallest handful of documents as to which we're claiming attorney-client privilege. That really isn't the problem. The problem is that our customers don't like us telling Brockton Savings Bank about their affairs.

THE COURT: That's part of the cost of doing business when you get into a lawsuit. Produce them. How much time do you want?

MR. DAHLEY: Your Honor, I'll need at least 30 days.

[27] THE COURT: Bernadette, let me see the book please. Is six weeks enough? Six weeks would take you to the 22nd of November. Is that enough? Now, don't tell me it's enough if it isn't because I don't want you to come in and ask for an extension.

MR. DAHLEY: I would rather it, in view of that, that you gave me another two weeks beyond that. I'm dealing with an out-of-town client.

THE COURT: The 29th is another week. That gives you—That's six weeks. Mr. Greco.

MR. GRECO: Your Honor, is that a date by which the documents will actually be produced in Long Island?

THE COURT: That's the date that they'll be there. I mean whatever—if you have some problem with your brother's request for additional time, tell me now.

MR. GRECO: It's, as I said earlier, it's been eight months. It will be ten months before we really get going

but if Mr. Dahley needs that time, what can I say? I will not object.

MR. DAHLEY: Well, if Mr. Greco's prepared to be reasonable and accept some limitations on his—

THE COURT: Well, reasonable is a word of [28] art. You people work it out. I'm saying produce them. If you can sit down and talk about it further between yourselves, that's your business. On what's been presented to me, I find that they should be produced and I'll order production by the 29th of November but I don't want a request for other time. So the 29th of November, now that's six weeks from now. If that isn't enough, tell me now. It seems to me from what you said it should be but well to be generous, the 29th is on a Tuesday. Monday the 5th of December. Now that's about as much time as anyone could ask for.

MR. DAHLEY: From a time standpoint, I could certainly live with that, Your Honor.

THE COURT: All right. This means that it be produced by then. Now on the next matter with Peat, Marwick, Mitchell, before I—

MR. GRECO: Your Honor, excuse me, may I ask one question?

THE COURT: Yes.

MR. GRECO: We've disposed of the document portion of our motion. We haven't mentioned interrogatory answers that the limited number that we want complete answers in view of your order. [29] Now, can we pick a date by which those answers will be supplied?

THE COURT: Well, those answers should be supplied before you go down there and look at the documents, but then again I'll ask your brother how much time it will take you.

MR. DAHLEY: Well—

THE COURT: Can you get it done in two weeks, three weeks?

MR. DAHLEY: Having in mind that I have a jury trial that's expected the last two weeks and involves very

(inaudible) subject of computer software, I don't see how I can do it before Thanksgiving, but if you give me until the day before Thanksgiving, I'll see what I can do.

THE COURT: Well, if I give you the day before Thanksgiving, you'll do more than see what you can do. You'll answer. So that we understand the subtle nuances that exist on either side of this bench, if you can produce by that time, fine. When I ask you for time what I'm trying to do, as you will learn as we go on, is to accommodate counsel, to make sure that counsel will comply and can, not will, but can within the period of time in question. So that if you want that much time and that would be the 23rd of November.

[30] MR. DAHLEY: Yes, Your Honor.

THE COURT: All right. Mr. Greco.

MR. GRECO: That's agreeable with me.

THE COURT: Then the interrogatories will be answered by the 23rd of November.

MR. DAHLEY: Thank you, Your Honor.

THE COURT: Now, on the next case.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-0478-N

BROCKTON SAVINGS BANK

v.

PEAT, MARWICK, MITCHELL & CO., *et al.*

CERTIFICATE

I, Armos Eyal, RPR, Notary Public in and for the Commonwealth of Massachusetts do hereby certify that the foregoing record is a true and accurate transcription of tapes transcribed verbatim under my direct control and supervision to the best of my skill, ability and knowledge.

ARMOS EYAL, RPR
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-0478-N

BROCKTON SAVINGS BANK,
Plaintiff,

v.

FIRST UNITED FUND, LTD.,
Defendant.

ORDER

NELSON, D.J. January 18, 1984

Information provided by the parties to each other in the course of this action shall be used solely for litigation purposes.

/s/ DAVID S. NELSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

USDC No. 83-0478-N

Mag. No. 133-84-D

BROCKTON SAVING'S [sic] BANK

vs.

PEAT, MARWICK, MITCHELL & Co.

BEFORE: Magistrate Robert DeGiacomo

PLACE: United States District Court

DATE: March 1, 1984

APPEARANCES:

Michael S. Greco, Esq.
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Boston, MA 02110

Richard Dahlen, Esq.
DAHLEN & GLOVSKY
75 Federal Street
Boston, MA

[1] THE COURT: Go ahead.

MR. GRECO: Your Honor, I believe, are two matters this morning. One is a motion for sanctions for defendant, First United Fund's refusal to comply with discovery orders of the Court and secondly, a motion filed by me two days ago to quash a subpoena and for a protective order with respect to certain deposition notices filed by defendant, First United.

With respect to the first matter, Your Honor, the motion for sanctions, I have not in my years at the bar seen a more flagrant abuse of the discovery and a more egregious refusal to comply with the Court's orders. There have been four orders entered by the Court by Your Honor and Judge Nelson and in each instance, the defendant, First United, has either totally ignored the order or has made partial or incomplete production. A brief chronology, perhaps, will set the background, Your Honor. I'll be very brief.

This case was filed on February 24, 1983, more than a year ago. When we filed the complaint, we filed requests for production of documents and interrogatories. The due date for those was thirty [2] days and forty-five days, respectfully. First United's lawyer asked for an extension of time. I granted an extension of time. The new deadline for answering interrogatories and producing documents became April 18 or 21, 1983. On April 21, 1983, First United answered interrogatories and produced documents but in name only, Your Honor, because the interrogatories that were answered were very few in number. They objected wholesale to our interrogatories on the basis that we were asking for a trade secret or confidential type information.

THE COURT: I remember the background of this.

MR. GRECO: They limited the scope of discovery to a four week period and only for the transaction involving my client, the Brockton Savings Bank, which had purchased a certificate of deposit from the Penn Square Bank, brokered by First United. Documents they pro-

duced—possibly twenty or thirty sheets of paper in a case in which we heard later, in this very courtroom, Attorney Dahlen say there were 1,500 lbs. of documents, which somehow were all protected because of business confidentiality. On May 9, Your Honor, I filed a [3] motion to compel discovery. That motion sought complete answers to interrogatories and complete production of all documents we had requested. First United opposed that motion and argued vigorously that the reason for their opposition was that their documents were somehow trade secret and that we were trying to invade the confidentiality of business relationships. That motion sat on the docket from May 9 until, approximately, August 18 when Judge Nelson called the parties into chambers. On August 18th, Judge Nelson asked for a status report and the status was, as I've just pretty much given it to, with respect to this matter, and Judge Nelson said, "Well, why don't we begin the process, First United, by your supplying Brockton with a list of all customers of yours, First United, that either bought or sold a Penn Square CD and then we'll go from there and we'll see whether that will suffice and we'll get the thing going." And that list was to be prepared and submitted within a reasonable time, which we thought was a week or two. From August 18 until September 22, more than four weeks, we waited, we prodded, we finally got a list. What was on that list—no identification of customers. [4] It was a list of transactions, some 212 or more with the names of all customers obliterated so that, in effect, Judge Nelson's order of August 18th was not complied with. We got something that was incomplete and largely useless. What happened next? I asked that our motion to compel of May 9 be referred to a Magistrate and it was referred to Your Honor. Your Honor held a hearing on October 18th and at that hearing, again, Mr. Dahlen vigorously advocated his client's position that the reason the interrogatories hadn't been answered and the documents not produced had to do with business

confidentiality. We stood here, Your Honor, for a long time and Your Honor denied or rejected Mr. Dahlen's arguments, allowed the motion to compel and Your Honor entered an order dated November 1, 1983. Now, when Your Honor entered that order, you asked Mr. Dahlen, in essence, "How much time do you need to answer the interrogatories and how much time do you need to produce the documents because you're going to produce everything, Mr. Dahlen. Don't come back to me. Pick a date that's sufficiently in the future so that I don't have to see you people again on this question." [5] November 23rd was chosen as the day to answer interrogatories completely. December 5, a seven-week delay, was chosen because Mr. Dahlen had a trial and Your Honor said, "Fine, December 5". During the hearing when Your Honor entered that order, there was mention of a protective order because of the confidentiality, so-called, of the business documents and at that hearing I remarked to Your Honor that whereas at one time I had been willing to enter into a protective order, all bets were off because that had been rejected and during the hearing before you, there was no demand made by Mr. Dahlen that a protective order issue. In fact there was no word, no mention of that until right before the interrogatory answers were due. Approximately a week before December—November 23rd, I received in the mail on November 15 or 14 a very extensive three or four or five page proposed protective order sent by Mr. Dahlen, which would have given his client complete protection in almost every conceivable way, limiting my use of discovery and creating a (inaudible) and my position, as expressed to Mr. Dahlen then, was it's too late for this kind of a protective order. First of all, [6] we've already gone this route and there is no protective order and you've not demonstrated that there's anything privileged or confidential to be protected. Now, his motion for a protective order was marked down and we reappeared before Your Honor on December 2, 1983. You

heard arguments again, extensively. First United refused to produce documents until this protective order business was cleared up. When we were before you on December 2, we tried to go through what it was that was protected or privileged or confidential and the only thing that emerged was the list of customers and I agreed that that list would be treated confidentially and nothing else that Your Honor or counsel at this table heard warranted the entry of the kind of protective order that had been proposed by Mr. Dahlen. So Your Honor denied the motion for a protective order of First United; denied the motion for a stay, and bearing in mind that you had ordered First United to produce the documents in seven-weeks [sic] time, ordered that those documents be produced to December 5, as originally scheduled, forthwith.

First United filed objections to your [7] orders, filed another motion for a protective order with Judge Nelson. The parties appeared before Judge Nelson on January 18th. Judge Nelson heard us in chambers. Judge Nelson, for whatever reasons, asked the parties to agree to a limited protective order. In fact, he said, "If you don't agree, I'm going to enter a one-sentence protective order of the type that the discovery in this case will be limited to litigation purposes." Counsel, after Judge Nelson left chambers, agreed to a sentence. We gave it. It was entered as an order. So that, in effect, the kind of protection that First United apparently was seeking was granted in that simple order, not the four or five page elaborate protective order they had proposed by the one-liner. Did that produce—Did we finally get out of the (inaudible) then? No, because Judge Nelson said, "You will now produce by January 28th all documents requested by Brockton. During the hearing before Judge Nelson, Mr. Dahlen asked Judge Nelson, "Your Honor, would it be appropriate for me, instead of producing actual correspondence between First United and customers of First United, to produce exemplars or sample or [8] model letters that we send out," and Judge Nelson

looked to me and said, "Would that satisfy you?" and I said, Your Honor, it's been almost a year now. No. We want everything. Everything has been ordered to be produced by Magistrate DeGiacomo. We will only come back to you again or to the Magistrate. This case has languished for a year. The answer is let's produce all of it now." What was produced on January 28th, Your Honor—exemplars, even though the order had been explicit. On January 28th or 30th we got some—we got two kinds of documents, Your Honor. We got two boxes, which are described in the motion, of so-called confirmation slips. These are slips that confirm that First United has brokered the transaction. We knew from the list of transactions filed back in September of 1983 that there had been some 212 transactions involving Penn Square and customers. Yet, on January 30 in these confirmation slips, there was only one slip confirming a Penn Square transaction. We brought that to the attention of Mr. Dahlen. Mr. Dahlen made inquiry and some days later, after some acrimonious pressing, we received in the mail a copy of some additional confirmation slips. [9] We got Mr. Dahlen's offer, "Tell me anything else you need." And my response was, "That is not the test now, Mr. Dahlen. The test is produce everything. It's not for me to try to figure out what's missing or what else there is. Produce what has been ordered." and what I have in mind, Your Honor, are on Page 6 of our memorandum, I list the things that we have not yet received. The most critically important thing we haven't received is the correspondence, the actual correspondence between First United and the 212 customers where I say in our pleadings, in our complaint, that First United made misrepresentations to Brockton and to others with respect to the kinds of investigation First United assurred [sic] customers, First United did, before agreeing to broker or banks CD's. In fact, we have obtained, Your Honor, and I would like to hand up to you two documents. One is a real, live letter—if I may.

MR. DAHLEN: May I have copies?

MR. GRECO: You certainly may, Mr. Dahlen. What I've just handed up, Your Honor, are two letters. One is dated July 28th, 1981 from First United's Tom Schofield to the New London [10] Hospital. The other is a letter that was produced, apparently, by First United in this discovery, I believe. You will see that the—what has been obliterated are the names of the customers and the sender. Now, a word about these two documents, Your Honor. The first document, in the third paragraph, there are two statements that read, "We are members of the Securities and Exchange Commission Organization and carry SITC insurance comparable to FDIC. In obtaining rates from us, New London Hospital is dealing with a firm acting in accordance with the standards of an agency of the Federal Government." The next paragraphs [sic] ends with the sentence, "Before First United represents a banking institution, our investment committee conducts a complete financial analysis." Those two same statements appear in the form letter or in the letter that is attached to this one, from which the names of the parties have been obliterated. Now, the other thing I've handed up to Your Honor, are the form letters or exemplars that were produced by First United on January 30. There are six of them. There is no date on any of these exemplars. We don't know whether they came into being last [11] week or when, number one. Number two, these letters are not of the type of the two that I've just shown you because none of these letters contain the two—the two representations, which I have just read into the record. Namely, about First United doing a financial analysis. The entire case that Brockton brings to this Court is premised on misrepresentation. We are told by First United that all we need are these exemplars, even though they have been ordered to produce all documents by Your Honor three times, even though they've been ordered expressly by Judge Nelson on January 18th to produce actual documents, not to be exemplars. So, now,

this morning, Your Honor, I am surprised—literally surprised by being handed an affidavit by Mr. Dahlen of a woman named Christine Lynn [sic] Alexander and I've just read it, as it's been handed to me, and the gist of this affidavit appears to be that these 212 transactions involving Penn Square and Customers brokered by FUF, First United, that there—apparently these letters don't exist. That this correspondence of the very type that I've just handed up to Your Honor with New London Hospital and the other one, don't exist. The last paragraph of [12] Miss Alexander's affidavit says, "as the substance of the forms or exemplars was stored in our processor's memory banks, copies of said form correspondence sent to a prospective client at an account executive's request were felt to be unnecessary and, as a result, not retained." This is the first time—

THE COURT: I don't have that affidavit.

MR. DAHLEN: Here it is, Your Honor.

THE COURT: Well, this is a very strange procedure, that you file a document and it isn't properly filed with the Court. Let me see that affidavit. Please be seated. Continue Mr. Greco.

MR. GRECO: Your Honor, this affidavit, assuming its accuracy and truth because it's made under oath, if the documents of the type that I have just shown Your Honor do not exist today, that raises some questions in my mind. Did they exist at any time?

THE COURT: Well, that's the question I was about to address.

MR. GRECO: And so there isn't—This affidavit, I guess, raises more questions and creates, [13] perhaps, more serious problems than appear. Because this is the first time, today, right now, is the first time in a year's time that I have heard the suggestion that that correspondence involving 212 transactions doesn't exist or was not retained. Your Honor, what is it then that is the nub of this dispute? It is this: For a year I have been frustrated and my client has been frustrated and has been put to legal expense in fighting motions and refusals to produce

documents. We heard for six or seven months that the reasons they didn't answer interrogatories and didn't produce documents, but those twenty sheets, was that there was a confidentiality that couldn't be violated. We tested those claims before Your Honor. We went through it ad infinitem [sic]. The result was, produce the documents with no protective order, answer the interrogatories, even after that order, my client was put to the legal expense of filing more motions, more briefs, appearing before Your Honor and we again prevailed and then did discovery take place? No. Then they objected, went up to Judge Nelson. Judge Nelson did not disturb any of Your Honor's discovery orders. Rather, he finally said, "agree to [14] a one-sentence protective order. That will take care of your's clients [sic] concerns. Now, produce documents within ten days." Did they? They did not, Your Honor, because the very critical documents, as usually happens in a case, when you cut through all of the flotsum and jetsum (phonetic), you come to those documents which prove or disprove the allegations in a case. That's what remains here. That's what is continued to be concealed, despite these four orders, and besides those 212 transactions in which there must have been correspondence of the very type that I've handed you, there must have been; either it existed and it's been destroyed—

THE COURT: Destroyed.

MR. GRECO. —or something else. Now, in addition to those documents, Your Honor, there are two or three other categories of documents, which we know must exist and yet, they have never been produced. Your Honor ordered First United to supply me with a list of documents being withheld. I asked for that and Your Honor said, "You will produce that list before—

THE COURT: I know, Mr. Greco; I remember this very, very clearly and I have not seen this type [15] of defiance and I'll give you, of course, an opportunity to explain. I have not seen this type of defiance in this court. I remember very well, from the first time you

appeared before me, Mr. Dahlen, you may be seated. Very well, please stand, Mr. Dahlen. The first time you appeared before me. I remember it very well how vehemently you argued; how strongly you took the positions that you had. I remember very well my response. My orders were a matter of record now. You had every right to appeal. I remember the controversy over the 1,500 lbs. I remember the controversy over where the documents were going to be and who was going to pay for it and all the rest of that. I'll hear you on the motion for sanctions.

MR. DAHLEN: Thank you, Your Honor. My client is 100 percent in compliance with this Court's orders. Let me prove it to you. First of all, I have here two items. A list of the—summarizing the interrogatories that we've answered and indicating when we answered them. A summary of the documents production in response to Mr. Greco's specific request.

THE COURT: Do you contend that you've [16] made the document production that you were ordered to make?

MR. DAHLEN: Absolutely, Your Honor.

THE COURT: By me?

MR. DAHLEN: Yes, Your Honor.

THE COURT: Anything else you want to say about it?

MR. DAHLEN: Let me show you what I've done. On this list—

THE COURT: Well, do you contradict what Mr. Greco has submitted? He's submitted orders, statements as to what has come in.

MR. DAHLEN: Yes, I do, Your Honor.

THE COURT: You've produced more than what he has said?

MR. DAHLEN: Absolutely.

THE COURT: Well, where is it?

MR. DAHLEN: Let me take you through—

THE COURT: No, no, no. Where is it? If you're ordered to produce documents, where are they?

MR. DAHLEN: Here, Your Honor, is a binder containing the documents we've produced—not just the ones we've made available but the ones [17] that have actually been copied and sent over to Hill and Barlow. Here is a binder containing our answers to interrogatories.

THE COURT: Now the documents that you've produced.

MR. DAHLEN: Yes, Your Honor.

THE COURT: Are those the documents that were called for?

MR. DAHLEN: Yes, they were, Your Honor.

THE COURT: The original documents—the letters, for example. The correspondence—all the correspondence? Is this the condensation of the 1,500 lbs?

MR. DAHLEN: To the extent we've been asked for documents and to the extent that those documents exist, they have been produced.

THE COURT: You've qualified it.

MR. DAHLEN: To the extent they exist and I hasten to say that to my knowledge there have been no destruction of documents. If Your Honor reads the affidavit, which came here today, because I have only exactly—

THE COURT: That affidavit is almost a year late; isn't it? What were we quarreling about [18] in here, if there were no documents? You never made any representation that there were no documents. This thing is a travesty. I ordered matters produced. Judge Nelson ordered them produced. If anything was to be withheld on the grounds of privilege, I specifically ordered a list produced.

MR. DAHLEN: No documents have been withheld on grounds or privilege, Your Houor. You have a sworn affidavit in that file from me saying that there are none.

THE COURT: There are none.

MR. DAHLEN: None.

THE COURT: You raised the question of privilege.

MR. DAHLEN: No, Your Honor. I raised the ques-

tion of confidential business information. That's what I was talking about. I wasn't talking about the attorney-client privilege. I said that I could not imagine that there would be more than a handful of attorney-client privilege documents in this case. Now I find that there are none at all.

THE COURT: There are none?

MR. DAHLEN: None.

THE COURT: Now, you've produced every [19] other document?

MR. DAHLEN: Yes, Your Honor and if you—

THE COURT: You are holding nothing back?

MR. DAHLEN: Correct, Your Honor. If you will allow me to go through the list of documents and answers to interrogatories, I'll show you exactly what I've done. I've done everything that my client can be expected to do. May I do that, Your Honor?

THE COURT: Go ahead because the motion for sanctions, I assure you, is being taken very, very seriously. So you'd better take your time and be accurate about it and be careful.

MR. DAHLEN: I have on these cards a summary of each of the specific interrogatories and each of the documents and answers that I've, so far as I can gather—

THE COURT: Deal with the documents first.

MR. DAHLEN: The first one is in dispute. The first document demanded was in dispute, asking for documents concerning First United's policies in checking on or investigating issuers and certificates [20] of deposit. We have said at least twice, and I think more than that, that there are no written policies within First United. It's a small company that's about three years old. It's run by a man named Mario Renda (phonetic), who runs it personally every day. No documents. The best we could do is produce a sample of the kind of material that First United looks at when it decides whether to take on a CD issuer and that happens to be a page from Polk's

Bank Directory giving the financial information about the issuer and it's the actual page that was used in the case of Penn Square. So, we've got everything we can there but we don't have written policies. The best Mr. Greco can do is take a deposition, which we're perfectly happy to let him do. The second documents are the ones that have been given the most time this morning. That is documents concerning First United's marketing of CD. Now, as I have apprehended the document demand, this is not a request for correspondence with the 212 people who purchased Penn Square CD's. It's a request for correspondence directed to prospective purchasers of CD's, who, believe me, there are thousands of them. They include banks [21] and credit unions, savings and loans,—

THE COURT: Go back, please.

MR. DAHLEN: Yes, Your Honor.

THE COURT: Did I understand you correctly to say that you did not consider the request for the documents concerning actual sales to customers of the CD's?

MR. DAHLEN: That's correct, Your Honor. I don't see that in the—

THE COURT: Just stop a moment, okay. Mr. Greco, will you comment on that?

MR. GRECO: Yes, Your Honor. I'm mystified because—

THE COURT: Well, I am. I thought that that's what this is all about.

MR. GRECO: That is what this is all about The very—Judge Nelson on August 18th, 1983 began by saying, "Identify those Penn Square transactions and the customers. So that we can then try to limit discovery in that fashion by not having the universe but by having those customers who were victims."

THE COURT: Well, I have a distinct memory of hearing argument on that specific issue about [22] the customers who purchased them and I think that this was —It's difficult to talk without a transcript but I think that this one of the main issues that you objected to, di-

vulging the names of these customers and I took the position that they had to be produced.

MR. DAHLEN: They have been, Your Honor.

MR. GRECO: Your Honor, may I read from Mr. Dahlen's supplemental response to plaintiff's first request, which supplemental response was filed recently in January? There are a couple of categories of requests, which cover what we're talking about. The one that reads: "All documents prepared by or distributed by First United relating or pertaining to its solicitation of prospective purchasers and sellers, including without limitation, issuers of and the marketing of CD's or other investment or commercial papers." Response: "Counsel for BSB has already been provided with all such documents which have any connection with the transaction in issue in this case. Copies of the forms and pamphlets otherwise used are provided herewith." That is a very clever response because the response says you have gotten everything in [23] connection with Brockton Saving's [sic] Bank transaction. We determined back in October that that was not the narrow focus of this discovery; it had to do with the other customers. The other 212, which Judge Nelson ordered to be identified in August, which in the past six months, as we've appeared before you, that is what's at issue here, the other Penn Square victims and I can't understand how he'd take the position now that still the only proper area of inquiry is the Brockton transaction, which is what that supplemental response says.

MR. DAHLEN: But Your Honor in fact, while we have last April produced the document and it's been handed up to you today, a re-creation of the form letter that went to Brockton Saving's [sic] Bank, which our bottom-line position is that's what is relevant. We, in fact,—

THE COURT: That has been argued (inaudible). So don't refer to that. That's dead. Now, please go on.

MR. DAHLEN: We've produced copies of the eight form letters that were in use in the period April through December, 1982.

THE COURT: Where are the customer's [24] letters?

MR. DAHLEN: We did, as the affidavit says, we didn't—my client did not maintain copies of letters sent to customers. What it did maintain was the one document that makes a difference in terms of—

THE COURT: Are you telling me that your client did not maintain copies of letters that went to customers who bought these CD's?

MR. DAHLEN: Yes, Your Honor.

THE COURT: Well, you're going to have to bring your client in this Court and have him testify under oath.

MR. DAHLEN: I'm sure he will, Your Honor. He did not even create copies. These letters—These solicitation letters are on a word processor. They are form letters. A secretary sits down and types out a name, an address, and off the letters go and they don't keep copies. What they do keep, and we've produced these, what they do keep are confirmation slips of every instant—

THE COURT: Your client keeps in a machine or out of a machine nothing, no background in material whatsoever, no records as to what went on [25] between the parties. Is that what you're telling me?

MR. DAHLEN: Your Honor, only one thing goes on between the parties after the party decides to deal with—

THE COURT: Please answer my question. Please answer my question. I think it's a fairly simple question. Is that what you're telling me?

MR. DAHLEN: That's what I'm telling you.

THE COURT: Where did the letter dated July 28th, 1981 come from?

MR. DAHLEN: It didn't come from me.

MR. GRECO: Your Honor, that letter we obtained from a source other than the defendant. It is the second letter, which I believe attach to it, from which names have been obliterated, which was produced in this litigation.

THE COURT: All right. Where did that one come from?

MR. DAHLEN: This came from me and names have not been obliterated. Somebody sat down at the word processor and punched out, typed form letter A, except it didn't have any names in it. It didn't include them. May I—

THE COURT: Up to this point I find what [26] you say incredible, but continue.

MR. DAHLEN: Thank you, Your Honor.

THE COURT: And if this is going to take some period of time, and I want you to have all the time you wish, then I'm going to suggest, since I have cases scheduled all morning long, that I recess, as far as this matter is concerned, and let you come back and you can take all afternooon, if necessary. Where's your client?

MR. DAHLEN: Long Island, Your Honor.

THE COURT: I think it might be wise to get him up here. I intend to see this to the end so that you will have every possible opportunity and your client will have every possible opportunity to explain what appears to be the most egregious conduct I've seen in this type of a matter in this court and that's why I think you should have all the time you want. Now, Mr. Greco, I don't know what your schedule is this afternoon, but I think this is a very, very serious matter. I look upon it very seriously.

MR. GRECO: I will be back, Your Honor. I have a deposition which I will commence now and suspend so that we can come back.

[27] THE COURT: All right. Mr. Dahlen, you are available all afternoon?

MR. DAHLEN: Certainly, Your Honor.

THE COURT: How much time does your client need? If you notify him now, you should be able to get him up here by—let me see, 2:00 o'clock, 2:30 at the latest?

MR. DAHLEN: I would be doubtful, Your Honor, but I'll make every effort.

THE COURT: Why would you be doubtful. You told me that he's in the—he works every day. He runs the business. He goes in there himself every day to run it. That's what you told me. This is why I'm making—taking this position.

MR. DAHLEN: Your Honor, if I can reach him and if he can get here,—

THE COURT: He is in that office.

MR. DAHLEN: Unless he's out of town, that's where he is. Yes, Your Honor.

THE COURT: You tell him to get on the shuttle and get up here. You tell him it's a very serious matter and that I intend to take testimony from him under oath and while you're at it, you might as well bring up the woman who signed the [28] affidavit. You're faced with a request for a default judgment on a million dollar purchase here. Now, I think you take it seriously. I'm sure you do. You're also faced with a request that you be held in contempt.

MR. DAHLEN: That I be held in contempt?

THE COURT: Somebody be held in contempt. There's a request of—I saw contempt in here somewhere. That's a strong word. Now, you came in at the last minute with this affidavit of destruction..

MR. DAHLEN: Your Honor, I must be allowed to say that I got 48 hours notice of this hearing and that's the fastest I can get an affidavit out of Long Island.

THE COURT: All right. That may be the fastest you can get an affidavit out of Long Island, but on a matter that's been going back and forth for so many months to have at this point suddenly notice of destruction issued, is a bit mysterious.

MR. DAHLEN: Notice of non-creating, Your Honor.

THE COURT: Well, notice of non-creation, notice of unavailability, call it what you will, is [29] a bit mysterious, especially when I recall the strength of your arguments. Well, if you don't want to bring them up here—

MR. DAHLEN: Your Honor, I'm only an attorney. I have no choice in that matter.

THE COURT: You represent these people.

MR. DAHLEN: I certainly do and I can certainly make an effort to reach them.

THE COURT: Well, you tell them that I want them up here for testimony and if you don't want to bring them up or they don't want to come up this afternoon, you go on the record and you tell me that. You tell them they're faced with a motion for a default judgment and contempt. Read it very, very carefully. I'm not going to go through the a, b, c's of this. You represent them, you're before the Court. I am not going to accept this type of conduct or this type of representation on argument. You offered an affidavit. It's not enough, in my opinion. I want the testimony. Now, I don't think I need say more. I'm giving you the opportunity and I trust that you will treat this with the seriousness and the courtesy that it is offered. Mr. Greco?

[30] MR. GRECO: What time do you want to see us, Your Honor?

THE COURT: Well, it's 10'00 o'clock. Either 2:00 or 2:30. If the half hour is going to make it easier to get someone up here, fine. Mr. Dahlen?

MR. DAHLEN: I really don't know, Your Honor. I've never had to move a witness from Long Island to Boston on this short notice.

THE COURT: It's easy. You just tell them to get on the shuttle. They go down to LaGuardia and they get on the plane. It's that simple. There's no problem about it. It's a question of priority and usually the United States District Court is given some priority.

MR. DAHLEN: Of course it is, Your Honor.

THE COURT: All right. So you go down and tell them or you get them on the phone and tell they they better come up here.

MR. DAHLEN: Your Honor, I suggest that since I'm about one-tenth of the way into my own arguing, that the half hour really isn't going to make any difference and that is I wouldn't put somebody on the stand right after that anyway, unless [31] Your Honor wishes. So I'd say if we agree to meet at 2:00 o'clock it's perfectly amenable to me.

THE COURT: 2:00 o'clock. Fine.

MR. DAHLEN. Thank you, Your Honor.

THE COURT: Thank you very much. The matter is recessed until 2:00 o'clock.

UNIDENTIFIED VOICE: All rise.

(Recess)

THE COURT: This is a continuation of Brockton Saving's [sic] Bank against Peat, Marwick, Mitchell & Co.

MR. DAHLEN: Your Honor, since this morning I've spoken with my client's in-house counsel, who's been with the company for three months.

THE COURT: Who is he?

MR. DAHLEN: His name is Stewart Steinburg [sic]. He's a member of the New York Bar. He's the in-house counsel at First United Fund. He advised me that Mr. Renda (phonetic), the President of First United, is travelling in California and cannot be reached. That's one prospective witness. We can't have him here because he's too far away and I can't get a hold of him. The [32] second prospective witness is the Executive Vice-President who was in charge of the company's operations at the time in question here, 1982. That's a Mr. DiCarlo. Mr. DiCarlo is terminally ill with cancer. He comes into the company, apparently, very infrequently. I can't really ask someone in that condition of health to come up here. Mr. Steinberg, himself, would be willing to come up here and testify as to what he found in the course of looking for documents, which I know he's done quite a lot of in the last couple of months, but he doesn't want to do that until he's spoken to his boss, Mr. Renda (phonetic) for,

among other reasons, the fact that Mr. Renda (phonetic) holds the attorney-client privilege. So it would have to be the person (inaudible).

THE COURT: This is the first time I've heard of the attorney-client privilege in this matter? You told me this morning that there were absolutely no documents where the attorney-client privilege was concerned.

MR. DAHLEN: That is true.

THE COURT: All right. What are you referring to? [33] MR. DAHLEN: I am referring to what Mr. Steinberg has done or what has been sent to him within the past three months, none of which would be responsive to either the document demand or the interrogatories before us now. It was my recommendation to Mr. Steinberg that the attorney-client privilege be waived in this matter for all purposes, not merely this interrogatory—these interrogatories and this document demand, but that is for Mr. Renda (phonetic) to deal with and Mr. Renda (phonetic), as I said, is travelling in California. Now, finally, as to the young lady who signed this affidavit, who is a fact witness and a very subordinate employee of that company, Mr. Steinberg did not wish to put her on an airplane to come to Boston. He didn't want to do it—

THE COURT: Steinberg did not wish to put her on an airplane to come to Boston after she filed an affidavit in this Court?

MR. DAHLEN: I filed the affidavit, Your Honor. She signed it.

THE COURT: She signed it.

MR. DAHLEN: Because she was a fact witness but she is not a managing agent or an officer [34] of First United. She was

(Tape ends at this point)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

USDC No. 83-0478-N

Mag No. 133-84-D

BROCKTON SAVING'S [sic] BANK

vs.

PEAT, MARWICK, MITCHELL & CO.

CERTIFICATE

I, Armos Eyal, RPR, Notary Public in and for the Commonwealth of Massachusetts do hereby certify that the foregoing record is a true and accurate transcription of tapes transcribed verbatim under my direct control and supervision to the best of my skill, ability and knowledge.

/s/ Armos Eyal
ARMOS EYAL, RPR
Notary Public

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CA. No. 83-0478-N

BROCKTON SAVING'S [sic] BANK

vs.

PEAT, MARWICK, MITCHELL & Co.

BEFORE: Magistrate Robert DeGiacomo
PLACE: United States District Court
DATE: March 1, 1984

[39] *APPEARANCES:*

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[40] THE COURT: She was to be here to testify concerning the factual matters set forth in the affidavit.

MR. DAHLEN: Your Honor, I have to stand on the affidavit and I might say that I've confirmed over the past couple of hours that what is described in this affidavit is exactly what happens when you send out form letters to a large number of people using a word processor.

THE COURT: On the basis of what I have heard about this case so far, I reject that affidavit, which is why I wanted the woman here, the affiant, in order to give you the opportunity to present testimony concerning the information that she swore to, which is in question, and secondly, to afford your brother the opportunity to question her and thirdly, to enable the Court to question her. Now, I'm afraid that your client, perhaps even you, do not really understand where you're going on this case. I want to make it perfectly clear, this is a hearing on a default judgment. You have, in an attempt, without finishing your argument, to rebut this motion submitted on affidavit. This affidavit, based on [41] your representations, over the past many months that I have heard this case, leaves grave doubt in my mind as to the accuracy (1) of your representations and (2) the representations made in the affidavit. Now, that's a very serious matter for the Court to say to counsel and it is very important in matters of this kind that counsel be given every possible opportunity to rebut any inference which would even remotely suggest what I have just stated to you. Now, I am not too sure you understand this and I am convinced that your clients don't understand this or understand the seriousness of what is going on here this afternoon. Now, it's all well and good to argue and to make protestations but the fact of the matter is, after a long period of time and intense argument, there has suddenly been submitted new information. In addition, when questioned on the record you made the statement that your client is always in the office, every day. It's a small company. For the first time you have made assertions in open court that were never made before with reference to these documents, were never made before Judge Nelson with reference to these documents. In the face of one document being produced by your [42] brother from another source, you have taken the position that there are no documents and you have submitted an affidavit by someone who is a low-echelon

employee, under oath, in support of the position there are no documents that have been sought for months and months. You have taken a position which I find absolutely astounding, that the thrust of this argument never concerned the letters; that I heard argument on the first day in this case and found relevant, which you, as was your right, appealed.

MR. DAHLEN: I did not appeal from that, Your Honor.

THE COURT: Well, you've appealed everything else. Forgive me. I assumed you appealed that but whatever it is, there was never a word from you about these documents. This Court is entitled to rely on the argument of counsel and when counsel protects an argument about the quantity of documents, the irrelevancy of the documents, the reasons why the documents shouldn't be produced and then, after going on in what I consider a very, very poor manner with reference to orders that were issued, both here and by [43] Judge Nelson, finally, at the last moment, suddenly produced an affidavit and says there are none. Then, in addition, does not produce the affiant, on the advice of someone in New York and in addition, talks about the attorney-client privilege. You, sir, in my opinion, have a great deal to explain and I've given you the opportunity to do it. Now, if you wish to continue with your argument, you may.

MR. DAHLEN: Your Honor, may I explain?

THE COURT: You may, of course, attempt to explain. Come up to the lecturn.

MR. DAHLEN: Your Honor, with respect to these specific documents, which are letters sent to prospective customers, not to existing customers, as I understand the document demand, I have never—

THE COURT: You misunderstand what this case is about. From day one Mr. Greco has taken the position that he wanted the letters that went to customers buying these certificates and it was your position that this was toally irrelevant. You asked me to block out the names.

You wanted a protective order. You went the limit on it and I disagreed with you. You then appealed on various [44] other matters. Now, please don't belabor that. That is the issue in this case, as far as I'm concerned. Now, some other court might overrule me, but that is—that's my position. It's been my position from the first day I heard you and I can't see how there could be any doubt about that. Now you tell me today they don't exist, but one existed, and your brother produced it, not from you but from another source.

MR. DAHLEN: Presumably the recipient.

THE COURT: Presumably the recipient and you ask me to accept a fact that a company such as the one you represent keeps no copies of any of these. They go into a machine and either the machine keeps them or doesn't and that's the end of it. Well, that may be the way you do business. I don't know but I have grave reservation, counsel, and it takes me a long time, in any case, to come to this point because I accept at full faith statements and arguments of counsel for any party until it's shown that I shouldn't and that I should question them and I question yours.

MR. DAHLEN: Your Honor, sir, I have never represented that those particular kinds of [45] letters exist. What I asked you to protect in the protective order was names that appear on documents such as this, which are confirmation slips recording transactions with specific actual customers. These documents, after the protective order was entered, were produced. They were produced late because of a foul up over which boxes should have been shipped to my office, but it was a simple human foul up. They have been produced. All of the names of the 212 people plus some of the addresses, and the addresses are available readily anyway, and all of the details of the transactions have been given to plaintiff's counsel. This is what I was trying to protect. This is what we were talking about the last few times we were here.

THE COURT: Where are the letters confirming those transactions—

MR. DAHLEN: Right here.

THE COURT: — soliciting those transactions. Where is the correspondence between your company and whoever purchased one of these certificates?

MR. DAHLEN: May I explain how one of these transactions works, as best I understand it?

THE COURT: Wait just a moment. Go ahead, Mr. Greco.

MR. GRECO: It's pure hearsay. That's my objection, Your Honor. The affiant who should have been here to explain what it means that they were not retained, whether it means that they were not retained initially or whether at a subsequent point they were not retained. With all due respect to Mr. Dahlen, it is heresay [sic] and I don't think he has the kind of understanding that his clients would have and I think—

THE COURT: No, neither do I. Neither do I.

MR. DAHLEN: Well, I'm perfectly willing to produce my client in Boston for a deposition, if Mr. Greco wants to do it. Mr. Greco—

THE COURT: I want your client produced in this courtroom—in this courtroom, under oath, and I want that affiant in this courtroom under oath. Now, I want to make that clear. That's an order.

MR. DAHLEN: Your Honor, may I ask for a continuance to produce my client, when I can find him, which I assure you I can—

[47] THE COURT: When you can find him?

MR. DAHLEN: Your Honor, he's traveling in California. I have no—

THE COURT: This morning you told me he was in New York.

MR. DAHLEN: No, Your Honor. I said that this is a small company with one person really running it. I think it is certainly—

THE COURT: I think you said he works in the office every day.

MR. DAHLEN: Your Honor, if somebody said—

THE COURT: But let's not belabor that. You don't know where he is.

MR. DAHLEN: That is true.

THE COURT: Does anybody know where he is?

MR. DAHLEN: No, except himself. He was due back in his office next Tuesday. I can try and shorten that period. All I ask Your Honor for is a continuance until I can produce him here. I have no compunctions at all about producing my client in this courtroom, but I do have to be able to get a hold of him. As I said this morning, Your [48] Honor, I am only an attorney. I don't have subpoena powers. I don't have the ability to do much of anything, if my client isn't even available. As far as documents are concerned, I have been working on this case for over a year trying to squeeze documents out of Long Island, New York, and I've been working very hard at it and I've been working very hard at trying to put together a reasonable, honest presentation in this courtroom. I think if Your Honor were to go to any of the Judges in the District before whom I've appeared and I've appeared very regularly before Judge Zobel, Judge Nelson, Judge McNaught across the corridor, Judge Caffrey, Judge Nelson, I think you find that I am regarded as being perhaps a bit of a hack but at least an honest one.

THE COURT: I have not yet come to the point of judging you. I can only comment on what has gone on in this case so far. You may have exerted every possible effort to get what you are asked to get and then what you were ordered to get. You may have misinterpreted something, which I doubt, and your client may have failed to cooperate with you. All that is possible. I am not [49] about to foreclose you. I continued this in order to enable you to have an opportunity to speak. I just don't think you or your clients understand what it is to be confronted with this kind of motion. Now, I think your clients, and depending on what they say, perhaps you, have a great deal to explain. I want it under oath with due caution

being given from the Court to counsel and the witnesses as to what it means to testify under oath. I also want it to be clearly understood what is involved. This is an application for a default judgment on a case involving a million dollar security. This is also an application for contempt, costs, and such other sanctions as the Court deems necessary. Now, I don't know what your clients think about this and I don't know what you think about it, but I am telling you now this is a very serious matter. Now, if you wish to ask for a continuance in order to produce your clients, and the affiant, and the vice-president, and whoever else has had anything to do with this case, then I will hear you as to how much time you want. Whereupon, I will hear from Mr. Greco.

MR. DAHLEN: Your Honor, my authority is [50] to ask for a continuance to produce—

THE COURT: Your authority is as counsel for your client before the United States District Court and as counsel, you have all authority. I'm not going to deal with some mystery person somewhere else. Your appearance is here, sir. Now, ask for what you wish.

MR. DAHLEN: A week from tomorrow.

THE COURT: A continuance of this matter for one week from tomorrow.

MR. DAHLEN: Yes, Your Honor.

THE COURT: Mr. Greco.

MR. GRECO: Your Honor, I have an obligation in Chicago starting on Wednesday evening that I cannot get out of and—

THE COURT: Today is Thursday—Friday. Today is Thursday, correct. Let me see the book. When do you have to be in Chicago, Mr. Greco? Wednesday evening did you say?

MR. GRECO: I believe that I'm scheduled to fly out Wednesday evening, Your Honor. Is there any reason why we can't schedule something for Monday or Tuesday of next week?

THE COURT: No reason whatsoever.

[51] MR. DAHLEN: Well, Your Honor, my client is due back from his trip on Tuesday and I have no assurance that I can reach him.

THE COURT: Well, this is going to be your last continuance and I'm going to order him to come in here. I'm going to give you a date. I've been as reasonable with this thing as I can be. I may not sound reasonable but I think I have been reasonable. This is the type of thing that I don't intend to put up with. I don't intend to put up with it all. Now, I'll give you a date and it's the last date I'll give you and someone better communicate with him. Tuesday morning at 10:00 o'clock.

MR. DAHLEN: Thank you, Your Honor.

THE COURT: Tuesday morning, 10:00 o'clock. This matter will stand continued until Tuesday morning at 10:00 o'clock at which time the Court will take testimony. Is that clear?

MR. DAHLEN: Yes, Your Honor.

THE COURT: Mr. Greco?

MR. GRECO: Yes, Your Honor. Thank you.

UNIDENTIFIED VOICE: All rise.

(Court adjourned.)

[52] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CA No. 83-0478-N

BROCKTON SAVING'S [sic] BANK

vs.

PEAT, MARWICK, MITCHELL & CO.

CERTIFICATE

I, Armos Eyal, RPR, Notary Public in and for the Commonwealth of Massachusetts do hereby certify that the foregoing record is a true and accurate transcription of tapes transcribed verbatim under my direct control and supervision to the best of my skill, ability and knowledge.

ARMOS EYAL, RPR
Notary Public

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CA No. 83-0478-N

BROCKTON SAVING'S [sic] BANK

VS.

PEAT, MARWICK, MITCHELL & Co.

BEFORE: Magistrate Robert DeGiacomo
PLACE: United States District Court
DATE: March 6, 1984

APPEARANCES:

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[3] UNIDENTIFIED VOICE: All rise. Brockton Saving's Bank v. Peat, Marwick, Mitchell & Company.

THE COURT: Mr. Dahlen.

MR. DAHLEN: Good morning, Your Honor. May it please the Court. As you know, my client takes the position that all existing responsive documents have been produced. There were, as of our last meeting, two affidavits in the file to that effect. Yesterday we moved for leave to add two others. There is no evidence to the contrary. That being so, while we appreciate and thank you for the opportunity to produce live testimony, we choose to stand on the record as it now exists.

THE COURT: You mistake your position. I ordered you to have your client and the affiant before the Court today.

MR. DAHLEN: Taking your words as an order in that case Your Honor, my client chooses not to obey.

THE COURT: And the affiant?

MR. DAHLEN: Her, also, Your Honor.

THE COURT: Have your advised your client [4] and the affiant of the consequences of a refusal to obey an order of the United States District Court in this case?

MR. DAHLEN: I have not spoken with the affiant, Your Honor. I have advised my client.

THE COURT: I directed you to speak to the affiant. Did you inform the affiant that she had been ordered to appear before this Court this morning for testimony?

MR. DAHLEN: I did not inform her of that, Your Honor. I did not understand you to direct me to speak to her.

THE COURT: Did you communicate with her in writing the order of the Court?

MR. DAHLEN: No, Your Honor.

THE COURT: Somebody ordered a transcript of this proceeding.

MR. DAHLEN: I have it here, Your Honor.

THE COURT: It's customary to file it, of course.

MR. DAHLEN: Your Honor, I had understood that Eyal Reporting Service files it—files the original and—

THE COURT: A copy has not been filed. [5] Have you—

MR. GRECO: I didn't know that there was a transcript, Your Honor. I'd like to have a copy of it.

THE COURT: All right. Let me see the transcript. We don't have a copy of it yet. This transcript is incomplete.

MR. DAHLEN: Yes, Your Honor.

THE COURT: Do you have the tape of the last hearing with you?

UNIDENTIFIED VOICE: Oh, no. I have the (inaudible) the first.

THE COURT:,Of this—This was the last hearing we had?

UNIDENTIFIED VOICE: Yes, (inaudible).

THE COURT: Is there another tape?

UNIDENTIFIED VOICE: There may be. This is side 5.

THE COURT: Well, put on the end of the last tape. For some reason or other your reporting service or our reporting service has not transcribed the entire hearing.

MR. DAHLEN: I realize that, Your Honor.

MR. GRECO: I have a series of questions [6] that is based both on the affidavit filed by Ms. Christine Alexander, who is not in the courtroom this morning. I have questions of Mr. Rhenda (phonetic) I have questions that are based on the affidavits filed last evening by Attorney Stewart Steinberg,who apparently is in-house counsel. He has made certain statements under oath and I believe that I am entitled to examine both affiants, the Christine Alexander and the Attorney Steinberg and Mr. Rhenda. I am prepared to do that, Your Honor, as you ordered us to do, Your Honor. In addition, since the last hearing I have looked through all of the pleadings, memoranda of law, motions filed with the court and I have for Your Honor references in those

filings with with the court, which lead a reasonable person, and lead me to believe that the very documents in dispute here did exist at one time. At the very least, Your Honor, there were several—there were numerous opportunities for the defendant and counsel for the defendant specifically to address a specific reference by me to these very letters, to the missing letters, and rather than having the response from the defendant or his counsel that we object on relevancy, [7] etc., etc., which they did say, and moreover, these documents don't exist. At no time was that representation made, Your Honor, until we were in court that last time on March 1, when I was handed the affidavit of Christine Alexander. In addition, Your Honor, I have looked at the body of correspondence between my office and Mr. Dahlen's office where, similarly for the past many months, starting in May of 1983, when we discussed the very subject of First United's refusals to permit discovery, among the numerous refusals was the one that had to do with these documents relating to at least the 211 other investors that I say were victimized by the Penn Square business. Fully apart from all the other investors that First United brokered CD's of other banks for and, again, the correspondence between Mr. Dahlen and me nowhere indicates that these letters were not retained or were never in existence. Rather, as late as February 24, which is 17 days after I filed my motion for sanctions, and in that motion I specifically, again, referred to this missing correspondence, which in my view is likely to contain the very kind of representations and misrepresentations that appear in [8] the two letters that I do have copies of. As late as February 24 I have a letter from Mr. Dahlen in which he says,—Your Honor, I'm incorrect on the date. The date of Mr. Dahlen's letter is February 16, 1984, addressed to me. On page two of that letter he addresses the very missing documents in dispute at the moment and he has in a paragraph numbered four, he states the following: "(4) Letters from United to

buyers and sellers of certificates of deposit. You have, as you know, the letter sent to Brockton Saving's [sic]. You have all of the correspondence sent by United to Penn Square. You have copies, finally, of form letters used by United in marketing and service." I will not comment on the accuracy of what I've read so far, Your Honor. The next paragraph then says, "I cannot imagine that you want me to send you a copy of every letter sent to everyone and I am not about to do that anyway." That statement, Your Honor, does not say they don't exist. That statement simply says you're not going to get them. The implication that I read from that, Your Honor, was there is something—there is something and I'm not going to get it for whatever reason counsel has and counsel's client has.

[9] THE COURT: Mr. Greco, do you know whether or not any of this correspondence was sought by the Congressional Committee?

MR. GRECO: I have not checked the hearing of that proceeding, Your Honor, to answer that question. In some [sic], Your Honor, I would like to believe the affidavits that have been filed by Miss Alexander and Attorney Steinberg. I am mystified why it is that after a court order to produce the client and the affiant so that we can get to the bottom of this this morning, they're not here. I am mystified why, for the slight inconvenience and slight expense that it might have cost the client, Mr. Dahlen's client, in a matter this grave and this serious, that they are not here to set the record straight. One can draw various inferences from their absence in this courtroom this morning, Your Honor. You have continued this hearing twice. We began it on the morning of March 1. We continued it to 2:00 p.m. on March 1 so that Mr. Rhenda [sic] and the affiant, Christine Alexander, could be in this courtroom at 2:00 p.m. on March 1. At 2:00 p.m. Mr. Dahlen reported that Mr. Rhenda [sic] was in California traveling, [10] couldn't be reached and that on advice of Attorney Steinberg, who this morning

files an affidavit in this court, Christine Alexander would not be produced. Your Honor continued the hearing from 2:00 p.m. on March 1 to this morning and I believe, from my notes and from the tape, you made it chrystal [sic] clear that Christine Alexander and the client, Mr. Rhenda [sic], who was to return by today, were to be in this courtroom this morning at 10:00 a.m. to undergo examination as to this serious matter. Instead of the people being here, we have yet additional affidavits, which give rise to more questions, Your Honor, and all I can say is that I am surprised, Your Honor.

THE COURT: Did you find that?

UNIDENTIFIED VOICE: Yes. The end of this transcript is on this tape.

THE COURT: All right. Put it up. The end of the transcript has been located on the tape.

(March 1, 1984 tape is played back. Side 5, 0-241)

THE COURT: All right. Take it off. You may be seated.

MR. DAHLEN: I really—Other than [11] offering argument on the merits of the motions, which I apprehend Your Honor is not interested in, I really have nothing more to say than that it is my client's decision not to appear here today and that it was entered as an order verbally, I ask that it be entered as an order in writing.

THE COURT: What?

MR. DAHLEN: I ask that you enter an order directing my client to be here in writing.

THE COURT: You were ordered to have your client here. You told me that you communicated the request but your client doesn't choose to be here. He doesn't want to come in. You were ordered to have the affiant here and you didn't even communicate the with affiant. I've heard enough. I have, not in my time on this bench or, indeed, in any court, when I was not on the bench, other than in the prosecution of disciplinary proceedings,

which this is not, ever seen conduct so defiant as this. I am going to make a recommendation in writing to the trial Judge that a default judgment be entered in this case. As one sanction, that all costs and fees necessitated by this hearing be paid by the client. I am going to recommend, and may [12] even set it down as a hearing, to have your client appear and show cause why I should not have him cited for contempt before the District Judge and I am going to take the same steps where you are concerned, Mr. Dahlen, as to why you should not be cited for contempt. It is also my intention to at some time submit a copy of these proceedings to Daniel Klubock, Esq., (phonetic), the bar counsel for such action and investigation, as he deems necessary with reference to you.

MR. DAHLEN: Your Honor, there is not a bit of evidence in these proceedings—

THE COURT: Just a moment. Just a moment. I am not hearing argument. If I determine that I should hear argument, rather than have Judge Nelson hear argument because, Mr. Dahlen, these matters are quite unique in this court, I will check the procedure and if it is necessary that I first hear argument as to whether or not you should or should not and your client should or should not be cited for contempt to the District Judge for a full hearing on the merits, then I will do it. If that's not required, then I will merely make a straight recommendation and then you can [13] appear before him at an appropriate time and your client, should he choose to either appear or again defy the Court, then Judge Nelson will deal with that, as he sees fit. Is there anything further, Mr. Greco, from you?

MR. GRECO: Your Honor, I'd like to say one thing and that is this. That had I been told months ago that these letters did not exist, we wouldn't be where we are today. I was never—

THE COURT: I assume so.

MR. GRECO: I was never told that, Your Honor. Mr. Dahlen has made the representation just now that there is no evidence on the record that these letters ever existed. Your Honor, I reserve my right to put into evidence the very matters I referred to a few minutes ago, which is all the pleadings and memoranda of law filed by First United in this case where they had the opportunity to tell me eight, nine months ago that these letters never existed, to put into evidence the correspondence between counsel and moreover, Your Honor, you have, as a result of my submission on March 1, not one letter, two letters.

THE COURT: Yes, that's correct.

[14] MR. GRECO: One is a letter that my client produced to me, addressed to the New London New Hampshire Hospital. The other, Your Honor, is a letter which was produced by First United to the plaintiff in this case. That letter is referred to in Mr. Dahlen's February 16, 1984 letter to me as, "You have, as you know, the letter sent to Brockton Saving's [sic]".

THE COURT: Yes, I'm aware of it.

MR. GRECO: That letter, Your Honor, contains the representations that I say are misrepresentations, to wit, that First United conducted an investigation of selling banks. Your Honor, that letter, in my view, establishes that the statement that's contained in that letter. I'll quote it. "Before First United represents a banking institution, our investment committee conducts a complete financial analysis". That representation, which appears in the letter sent to Brockton, according to counsel Dahlen's representation, apparently there is at least one letter, which is not a form letter, which is the letter as customized in accordance with the statements made by Attorney Steinberg in his affidavit of this [15] morning and customized as according to the statements made by Christine Alexander in her affidavit.

THE COURT: You see, Mr. Greco, I, too, spent some time preparing questions in the hope that this matter would be clarified and I, too, noted the matters

you are referring to. I assumed that you and Mr. Dahlen would question the affiant and the client with particular reference to this problem and then if my questions weren't answered through your own interrogations, then I would have addressed the same matter. From my point of view, that is all now past.

MR. GRECO: I point this out, Your Honor, only so that if an appellate court should ask the question: What evidence was there before Magistrate DeGiacomo from which the inference could be drawn that these letters did exist at one time? I would submit three indications, Your Honor. One are the memoranda of law and responses made by First United to plaintiff's request over a nine or ten month period, which lead me to believe and, I think would lead a reasonable person to believe that these letters did exist at one time. Secondly, the correspondence between counsel for [16] the plaintiff and counsel for First United of the same type, that is, at no time was I informed that these letters never existed and in fact, as late as February 16, counsel for First United tells me that he wouldn't produce such letters, not that they didn't exist but that I was silly; that these things would not be produced and thirdly, Your Honor, the letter, which has been referred to as the letter sent to Brockton, which does contain what I say is the misrepresentation. Why do I say it's a misrepresentation, Your Honor? Because this letter says what it says about doing these analyses and investigations and yet, in the interrogatories filed by the plaintiff, answered under oath by First United, as to which Mario Rhenda [sic] reviewed those answers, the statement made was that no such analyses was [sic] ever done. That leaves Your Honor to the question: Why is it that the ten form letters that have been produced, which are not dated, there is no indication when they came into existence, whether it was in 1982 when my client was victimized or 1983 or 1984. None of those ten form letters contains the misrepresentation that the Brockton letter contains and so I say to Your [17] Honor

that while Mr. Dahlen takes the position here that there is not any evidence in the record to indicate that these letters ever existed, I believe that is—that statment must be measured in view of the indications I've just given. That [illegible] pleadings filed, the correspondence between counsel [illegible] what I call Exhibit No. 1, which is the very letter which was sent to Brockton, which contains misrepresentations nowhere to be found in the ten forms. Your Honor, I reserve my right to submit to you, if Your Honor wishes, copies of that correspondence I've just referred to, copies of the pertinent pleadings in which First United had the opportunity to tell me that these letters never existed and rather, made statements which imply that they did exist, that correspondence did exist and finally, Your Honor, that there—to make the record complete, the letter that was sent to Brockton is a very necessary component of this entire puzzle. That is why is it that this letter says what it says, the form letters don't say what this letter says and how is it that they were able to tell me that this was the letter sent to Brockton when the affidavits that have been filed seem to [18] indicate that no copies of such letters were ever kept and no one at First United knows what kind of representations were made to the many thousands of potential investors.

THE COURT: Well, I would like you to submit everything you choose for the record with copies to Mr. Dahlen, of course, and he may have, also, if he has anything else he wishes to submit for this record, to submit it. My position is that I'm going to—I'm satisfied with what I have but you may submit it. You've made reference to it in argument and I will also allow Mr. Dahlen to do the same in support of whatever he wishes to support in this, but before I hear anything further from anyone, I'd like to read to you from Page 17 of the transcript of the hearing before me on October 18. Mr. Dahlen has just finished arguing about relevance that the materials wanted could not possibly lead to the

production of admissible evidence. "I think it's important, I said that they be able, the moving party, unless you want to submit it, that they be able to determine what were your policies with reference to your clients, your banking clients with whom you [19] did business throughout the country. Mr. Dahlen: That we're perfectly happy to give them. If they want general statements of policy, rules by which the company operates, they can have that." And then I said, "They would like to see how you carried it out. You see, I think that you've got to make a beginning on this and start producing something that goes to the point. I don't think—I think you're sidestepping it frankly, at this time. I think that's—that what's been requested is relevant. Now, you say it's too much. You're going too far afield. If you can show me how some aspects of what have been sought really have nothing to do with what you, yourself, have put in issue in denying the allegation, then that's a different situation. You know the—Well, I don't have to tell you people how broad this is—this type of discovery. You're well aware of that. This happens to be the first time I've seen this case. That means that absent unusual circumstances, we're going to live together on the pre-trial of this—pre-trial discovery procedures of this case, until it's ready to go to trial, absent unusual circumstances. So, you're going to be coming back in [20] here, as your brother and sister are. You don't get along to see me periodically and we might as well make a beginning. You just can't argue some of these things in a vacume [sic]. I'm willing to try to limit, if limitation is necessary, any type of discovery. I'm well aware of the abuses of the discovery process and as you'll find out, if you abuse the discovery process before me, I'll impose sanctions without looking at you twice and I don't say that as a threat. I say that just the way it is. I rely on counsel to run the case properly. Now, with reference to discovery, I'm perfectly happy at any time to sit down with counsel, when there are discovery problems. All you have to do is ask for a

discovery conference, if you don't get along. You don't have to file a paper; you don't have to file motions. All you have to do is ask for a discovery conference and I'll talk with you. I'll find time to talk with you. The whole purpose of this is to get this case on the table so that if there is a case, then maybe you'll settle it or if you can't agree on it, you'll go to trial and if there isn't a case, then you'll get that information quickly enough and the whole thing will disappear. [21] So in brief, my positions on discovery, and that I think the stronger case has been made, with what I know about this, by the requesting party and I think they're entitled to look. I think they're entitled to examine the papers that you have on your dealings with other banks. I think they're entitled to examine what you told other banks, your client, and what other banks did based on that advise, what was purchased, what was sold, and what was the result. Mr. Dahlen: Well, Your Honor, so that they don't put us out of business, may we at least have that inspection on Long Island where the paper is?" There was no objection. There was some talk about 50 or 100 pieces of paper for which you might be claiming privilege. We tried to get together on a date. Mr. Greco stated he wasn't insisting on dates on anything unreasonable. "I'm saying in terms of spending the banks [sic] money and when we're talking about the Brockton Saving's [sic] Bank, we're talking about a lot of individual depositors who stand to lose up to a million dollars and I don't want them to incur any unnecessary legal expense on trips down to Rhode Island—two or three trips." I stated, "I assume that Mr. Dahlen [22] knows what's in and what the documents are." Mr. Dahlen stated, "Your Honor, as I read their document demand, they want every piece of paper in the offices." I said I didn't think they wanted every piece of paper and if they did, they wouldn't get it. "Well, we do only one kind of business" you, Mr. Dahlen. "One single kind of transaction. They're asking for every piece of paper relating to every one of those transactions

with every CD issuing bank and every CD purchasing bank and that's everything. There really isn't anything else." You stated you would be happy to give Mr. Greco everything that relates to our investigations of other banks. "I would be happy to give him statistical information, broken down, perhaps, by bank or by size of bank, as to what transactions we've conducted since the beginning of 1980. That's something we can do. He doesn't have to go to Long Island to get that. I can get that up here. I know what he's talking about there but when he asks for everything about every transaction between every one of this kind of bank and every one of that kind of bank, that's all we've got. That's my problem. I'm certainly not trying to be [23] obstructive. I'm not trying to raise the legal fees of the Brockton Bank's depositors, any more than I'm trying to raise it on my own client's shareholders." Then I went on to say, "Well, you're not going to be—that would be you, Mr. Greco and also, of course, Mr. Dahlen. Well, you're not going to have to rely on that. It's my position that you should have a list of every bank they did business with and sold certificates of deposit. The next item is that the investigations that you've made reference to the bank's [sic] whose products you sold. Anything that pertains to what indicates you should—you did, should be produced." Then you offered to aid in the confidentiality problem, to limit things. More talk about dates, a long discussion about privilege. "If there's anything you're going to claim privilege on in the production of these documents, identify the documents in your claim of privilege sufficiently so the document can be understood as to what type of a document it is, what it does, what it purports to be, what does it contain and under those circumstances, claim your privilege." And you, Mr. Dahlen, said you seriously doubted that it's anything more than [24] the smallest handful of documents to which we're claiming attorney-client privilege." "That really isn't the problem. The

problem is that our customers don't like us telling Brockton Savings Bank about their affairs." And I said, "That's part of getting into the business." You wanted thirty days, then we went to six weeks. Then I ordered production to the satisfaction of you, Mr. Dahlen, as far as time was concerned. From there we went into interrogatories.

Now, I haven't read you the whole transcript but I suggest you read it yourself and I suggest you read the next one. There was a proposed protective order. I'm sure you remember that. Mr. Greco objected to it. Before you produce anything. That dealt with the—all right. Page 9, December 2nd hearing. A customer list. You said you didn't want—Well, I'll quote you. "A customer list is the most classic sort of trade secret, Your Honor. That's what we don't want them to feel free to give to anyone they happen to be talking to at a cocktail party." Mr. Greco, without referring to cocktail parties, said that the list would be kept confidential. Next, [25] Mr. Dahlen, "Those other documents in our files, which reflect who are [sic] customers are, from which the customer list could be constructed—The Court: What are they? Mr. Dahlen: They are confirmation slips, invoices, letters, virtually all of the documents that have been requested, which we are prepared to produce, if they don't plan to do anything with these documents other than litigate this case, and my brother, Greco, is fully entitled to them and will get them. I just don't want him giving them to somebody else—to somebody else. No, Your Honor, you see, you've just put your finger on the point—from Mr. Greco—If I see some other victims on that list, I want to talk with those victims." Well, you seem to have parted in fairly—with a fairly decent understanding of what everybody was going to do. Mr. Greco argued that you were mistaken in saying that somehow First United was being put in a competitive position with the Brockton bank. "I don't know what the problem is", he said. "I've heard nothing to distinguish

this case from the countless other cases in which people or entities do something to each other and there are documents [26] that relate to that something and there are commercial documents or there are personal documents and they're produced." I denied the motion of a protective order with the exception of a customer list, which you said you were producing, Mr. Dahlen, and you responded, "Well, very well, Your Honor, with respect to the production of documents then but not with respect to the interrogatories, since that's the one confidential commercial information. May I have a stay?" "No, the stay is denied. Produce the documents." "Thank you." "Thank you." And that ended that. I suggest you go through it quite carefully. Now, Mr. Dahlen, is there anything you want to say before we adjourn this?

MR. DAHLEN: No, Your Honor.

THE COURT: All right. Mr. Greco, anything further?

MR. GRECO: Only, Your Honor, if Your Honor wishes, I will submit an affidavit, attached to which will be the references to the memoranda and oppositions filed by First United relating to these missing documents and—

THE COURT: Well, I want—Yes, I'd like you to—You can submit—You submit what you [27] think you should submit for purposes of clarification or with reference to anything that's here. I want it to be perfectly understood. I'm satisfied and I am—And I have announced on the bench it is my intention to enter an order, a recommendation, since I don't have (inaudible) jurisdiction, on the basis of what there is so far for a default judgment and the various other matters that I've made reference to. If—Since you're the moving party, if you wish to have an opportunity to produce further information and continue this hearing in that regard, when then I'd have to give—I'd have to give your brother, of course, the opportunity to come forward too. If you wish to submit anything, any clarification or

further rebuttal, then I will give him the opportunity, as indeed he's entitled to it to go forward. From my point of view, I think I've heard enough. I think I've said enough. I think it's—I think the Rhode Island—Damiani (phonetic) against the Rhode Island Hospital, I just have the slip opinion citation before me and I have the slip opinion before me, March 30, 1983, Slip Opinion 82 1429 from, of course, the First Circuit, in my opinion, the matters that brought about [28] the default in that case are as—are less than what is going on here today, than what is going on here today and I've also reviewed a—I don't have the citation with me but you're probably familiar with it and if you want it, you can call my clerk and she'll give it to you when I get upstairs. The case involving one of those two magazines, *Penthouse* and *Playboy*, from the D.C. Circuit on default for failure to produce documents. This is at least that (inaudible).

Mr. GRECO: Your Honor, in view of what you have said and in view of what Mr. Dahlen has said, I will not be filing anything further. The record will stay as it is.

THE COURT: All right. Thank you very much.

UNIDENTIFIED VOICE: Thank you very much.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 83-0478-N

Magistrate No. 133-84-D

BROCKTON SAVINGS BANK

v.

PEAT, MARWICK, MITCHELL & CO., *et al.*

MEMORANDUM AND RECOMMENDATION
RE MOTION FOR SANCTIONS

May 14, 1984

DeGIACOMO, U.S.M.

The plaintiff has moved for sanctions against defendant, First United Fund, Ltd. ("the defendant"), for failure to comply with the court's discovery orders, and has requested (1) the entry of judgment by default, (2) reasonable expenses and counsel fees in accordance with a submitted affidavit, and (3) an order of contempt, for the reason that the defendant and then counsel, Mr. Dahlen, by a gross abuse of the discovery process, delayed the proceedings, caused unwarranted legal expenses, disobeyed orders of the court, deliberately mislead the court and plaintiff's counsel as to the existence of documents sought, and finally wilfully refused to appear before the court when ordered to do so.

Following a hearing, and extensive briefing by successor counsel for the defendant, and counsel for the plaintiff, I am satisfied that (1) a judgment by default

should be entered against the defendant, First United; (2) expenses and counsel fees, in accordance with the affidavit of plaintiff's counsel, be awarded following a hearing on the submitted affidavit, unless waived; (3) that the factual record set forth herein be considered as certified under the provisions of 28 U.S.C. § 636(e) for the purposes of requiring the president of the defendant corporation and Mr. Dahlen to appear before the trial judge on a day certain to show cause why they should not be adjudged in civil contempt by reason thereof, but only in the event the sanctions of default and costs are not imposed.

I. BACKGROUND

A. *The Complaint*

Brockton Savings Bank filed its complaint on February 24, 1983, against Peat, Marwick, Mitchell & Co., two named partners of that firm [1] and First United. The complaint alleges: that First United is a broker-dealer registered with the Securities and Exchange Commission and engaged in the business of brokering money and other securities; that an account executive of First United telephoned plaintiff and made certain representations with regard to certificates of deposit of Penn Square Bank, among which were that it investigated the condition of each of its bank clients before brokering certificates of deposit, and it had brokered Penn Square certificates of deposit in the past; that these and other representations caused plaintiff to believe that the purchase of a million dollar Penn Square certificate of deposit was a sound investment, when in fact it was not in that an examination of Penn Square by the Office of the Controller of Currency (OCC) in the spring of

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[1] In an order, dated December 9, 1983, (Docket No. 89), motions to dismiss for failure to state a claim upon which relief can be granted under Fed.R.Civ.P. 12(b)(6), filed by defendants Peat, Marwick, Mitchell & Co., and the two named partners, were granted.

1980 revealed various deficiencies in Penn Square's operations, which resulted in a continuing deterioration of Penn Square's financial condition. The complaint further alleges that (1) First United knew, or was reckless in not knowing, that the representations were untrue; (2) they were made to induce plaintiff to purchase the certificate of deposit; and (3) the plaintiff relied on the representations and did purchase a million dollar Penn Square certificate of deposit. On July 5, 1982, after plaintiff purchased the certificate, Penn Square was declared insolvent and a receiver was appointed. As a result of the above, plaintiff lost a portion of its investment.

Counts five through twelve are brought against First United. Alleged are violations of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 (Count 5); § 17(a) of the Securities Act of 1933 (Count 6); state law fraudulent misrepresentation (Count 10); and state law negligent misrepresentation (Count 11). Plaintiff seeks its full amount of damages with interest under those counts. Also alleged are violations of § 12(2) of the Securities Act of 1933 (Count 7), for which one million dollars, or alternatively its damages, with interest is sought; violations of M.G.L. ch. 110A and various Oklahoma statutes (Counts 8 & 9) for which one million dollars or its damages, plus interest and reasonable attorney's fees, are sought; and violations of M.G.L. ch. 93A (Count 12), for which treble damages, or alternatively double damages, with interest and reasonable attorney's fees, are sought. Also sought on the entire complaint are costs and reasonable attorney's fees.

B. *The Facts*

Plaintiff's attorney, Michael Greco, filed a set of interrogatories (Docket No. 6), and a request for production of documents (Docket No. 10) with the complaint. Interrogatory No. 9 requested First United to "identify

all documents prepared by or distributed by First United relating or pertaining to its solicitation of prospective purchases and sellers (including without limitation, issuers) of and the marketing of [certificates of deposit] or other investment or commercial paper." The term document was defined to include letters. Other interrogatories requested policies and procedures used in determining whether First United would broker an issuer's certificate of deposit or other investment or commercial paper (Interrogatory No. 6); identification of all banks for which First United "provides or has provided brokerage services with respect to the sale or offer for sale of certificates of deposit or other investment or commercial paper," and the dates such services were first provided (Interrogatory No. 10); and descriptions of all business transactions between First United and Penn Square (Interrogatory No. 14). Documents relating to the above were requested in Plaintiff's Request for Production of Documents.[2]

At the end of April, First United's responses to interrogatories and requests for production of documents

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[2] Document Requests 1 through 7 are as follows: 1) All documents which constitute, contain, refer to, or relate to the policies, standards, procedures or practices with which First United's determination whether to broker an issuer's CDs or other invesment or commercial paper; 2) All documents prepared by or distributed by First United relating or pertaining to its solicitation of prospective purchasers and sellers (including, without limitation, issuers) of and the marketing of CDs or other investment or commercial paper; 3) All documents, including without limitation, letters, audited financial statements, and annual reports, sent by Penn Square to First United; 4) All documents sent by First United to Penn Square; 5) All documents, regardless of source which concern, refer to or relate to Penn Square which First United received prior to April 28, 1982; 6) All documents, regardless of source, which concern, refer to or relate to Penn Square which First United received on or after April 28, 1982; 7) All documents which constitute, contain, relate to or refer to research, tests and procedures performed by First United in determining whether to provide brokerage services to Penn Square.

were filed by its then attorney, Richard Dahlen. (Docket Nos. 21 and 23). First United objected to producing certain materials, including documents or portions of documents containing information relating or referring in any way to purchases or prospective purchases of certificates of deposit other than plaintiff's purchase. It made several general objections, including that such requested information was not related to the facts or claims in this law suit, was unnecessarily broad and burdensome, and was confidential. The documents produced included one solicitation letter which did not contain the name of the addressee. (Affidavit of Michael S. Greco, Docket No. 133, "Greco Affidavit," ¶ 6, Ex. 2A.)

On May 10, plaintiff filed a motion to compel the discovery and a memorandum in support thereof. (Docket Nos. 31 and 32). Plaintiff presented argument on why it was entitled to information related to transactions other than plaintiff's purchase of the Penn Square certificate of deposit. Among other things, it argued such information was relevant as to (1) whether First United misrepresented either the scope of its investigation of Penn Square or Penn Square's financial condition, to aid in determining witnesses for trial; (2) the extent of duties First United undertook for purchasers of certificates of deposit, a disputed fact; and (3) the extent to which First United knew or should have known about Penn Square's financial condition, and whether First United had any improper motive or incentive to promote the sale of Penn Square certificates of deposit. The plaintiff also suggested a protective order for information deemed confidential.

After the parties stipulated to extend time (Docket No. 35), First United filed its opposition to the motion to compel and a memorandum and affidavits in support thereof. (Docket No. 42-45). On page four of its memorandum, First United acknowledged that it understood what was being sought by plaintiff and stated:

> What United has not provided, and what Brockton seeks by this motion to obtain, is detailed information concerning United's dealings with investors other than Brockton. . . .
>
> The information sought is not insubstantial. Since United began business, it has quoted rates on [certificates of deposit] approximately 7,000 times each month. . . . These quotations have resulted in approximately 4,000 separate transactions each month. . . . The volume of paper on file to record these quotations and transactions weighs approximately 1,500 pounds.

(DeCarlo Affidavit, ¶ 5.) It argued that the information was irrelevant and confidential.

Plaintiff filed a response (Docket No. 47), again suggesting an appropriate protective order would cure the problem of confidential information.

On August 18, 1983, a status conference was held before Judge Nelson. It is not apparent from the docket whether Judge Nelson entered an order with regard to the motion to compel at this conference. However, plaintiff has submitted by affidavit that Judge Nelson stated he would rule on the motion to compel discovery in stages, and as a first step, ordered First United to produce within ten days a list identifying all Penn Square certificate of deposit transactions brokered by First United. (Greco Affidavit, ¶ 12.) The Greco Affidavit further indicates that there were communications between the parties after the status conference, that First United indicated it "would probably not identify the Penn Square CD transactions, brokered by First United," and that on September 22, First United produced a list of 212 Penn Square certificate of deposit transactions brokered by First United between April 2 and July 2, 1982, with the names of the purchasing banks omitted. (Greco Affidavit, ¶¶ 13, 14, Exs. 3 and 4.)

Plaintiff renewed its motion to compel discovery and a hearing was held before me on October 18. (Tran-

script of Hearing, Docket No. 86). At that hearing, Mr. Dahlen had two basic objections, volume and confidentiality. He stated:

> MR. DAHLEN: They appear to be looking for all of the transaction records of banks that we were quoting CD's to, not banks whose CD's we were quoting, but banks that actually did business based on our quotations and that is a problem because the bank issuing the CD and the bank buying it is expecting a certain degree of confidentiality, first. The second thing is, that's a lot of paper. That's all of our business records relating to everyday—
>
> THE COURT: Well, how much paper is it?
>
> MR. DAHLEN: Fifteen hundred pounds.

(Tr. 6-7) Mr. Greco stated later in the hearing:

> MR. GRECO: If he will supply what's on those requests and then he says to me "this request we're not going to produce because it asks for 50,000 pieces of paper", again my response there would be your Honor, I'm willing to undertake that burden. If it's a confidentiality problem that First United Fund has, and I've offered a protective order which will limit review of those documents solely to trial counsel.

(Tr. 24-25) Mr. Greco also specifically made reference to letters he was attempting to obtain. He showed the court two letters, one solicitation form letter, undated and without an address previously produced by First United, and one solicitation letter with an address which plaintiff obtained from another source. (Greco Affidavit, Exs. 2A and 2B.) He argued he was entitled to copies of the actual letters sent to other buyers, complete with names. (Tr. 11-13) At the conclusion of the argument, I allowed the plaintiff's motion and ordered supplemental answers to interrogatories to be filed by November 23 and documents produced by December 5, 1983 in Long

Island, where they were located.[3] Mr. Dahlen assented to the dates (Tr. 28) and made no reference to Mr. Greco's suggestion as to a protective order on confidential documents.

On November 23, First United filed supplemental answers to interrogatories under seal (Docket No. 79) and did not serve a copy on plaintiff. (Greco Affidavit, ¶ 20). At the same time, First United filed a motion for a protective order (Docket No. 78). Plaintiff opposed the motion (Docket No. 81) and a hearing was held before me on December 2. (Tr. of Hearing, Docket No. 90.) At the hearing, Mr. Dahlen was asked what documents he sought to keep confidential. He answered, a customer list attached to the interrogatory answers, to which it was agreed it would be kept confidential. As to other documents he sought to keep confidential, he stated:

> MR. DAHLEN: They are confirmation slips, invoices letters, virtually all of the documents that have been requested and which we are prepared to produce.

(Tr. 9)

After hearing argument, the motion for a protective order was denied, except with regard to the customer list. An oral motion for a stay was also denied. (Tr. 9, 14, Docket No. 78.)

On December 5, First United served its supplemental answers to interrogatories on the plaintiff. First United did provide a list of banks for which it provided brokerage services, with respect to the offer for sale of certificates of deposit and the date such service was first

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[3] See Transcript, p. 19:

> THE COURT: I think they're entitled to examine what you told other banks, your clients, and what other banks did based on that advice. What was purchased, what was sold, and what was the result.

provided. (Docket Nos. 79, 139, Interrogatory Answer 10.) However, it failed to supplement its answer to Interrogatory No. 9 requesting identification of documents prepared or distributed by First United relating or pertaining to its solicitation or [sic] prospective purchasers or sellers. (Docket Nos. 79, 139, Interrogatory No. 9.)

On December 2, First United filed a motion to stay the production of documents on December 5 pending a review of the denial of the motion for a protective order. (Docket Nos. 84, 85.) Plaintiff filed an opposition. (Docket Nos. 87, 88.)

At a hearing held before Judge Nelson on January 18, 1984, Judge Nelson entered a brief order that information provided by the parties to each other should be used solely for litigation purposes. (Docket No. 95). First United requested permission to produce "exemplars" or "forms" of certain letters requested by the plaintiff, rather than the actual copies. This request was denied by Judge Nelson, and all documents were ordered produced within ten days.[4]

On January 27, First United filed its supplemental response to plaintiff's requests for production of documents. (Docket Nos. 96, 138.) First United produced 130 sheets of paper and later produced two small boxes of documents. (Greco Affidavit, ¶¶ 25, 26.) First United supplemented its response to request No. 2 by stating:

> Counsel for [plaintiff] has already been provided with all such documents which have any connection with the transaction in issue in this case. Copies of the forms and pamphlets otherwise used are provided herewith.

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[4] Although this order is not noted on the docket, counsel for both the plaintiff and First United agree this is what occurred at the January 18th hearing. (Greco Affidavit, ¶ 24; Memorandum of Defendant First United Fund in Opposition to Plaintiff's Motion for Sanctions, Docket No. 130, p. 3.)

Attached were twelve undated and unaddressed form letters. (Docket No. 138, Request No. 2.)

On February 7, plaintiff filed a motion for sanctions and a memorandum in support thereof (Docket Nos. 97 and 98) for failure to comply with discovery orders. It requested (1) judgment by default, (2) an order of contempt against First United, (3) reasonable expenses, including attorneys fees, and (4) any other relief the Court deems just. An opposition was filed (Docket No. 99), along with affidavits in support and in opposition to the motion (Docket Nos 100, 102). After the motion was filed, correspondence passed between counsel. (Greco Affidavit, ¶¶ 28-30, Exs. 10-12). Among them was a letter sent by Attorney Dahlen to Mr. Greco, dated February 16, 1984. This letter indicates that copies of confirmation slips were enclosed.[5] This letter acknowledged that Attorney Dahlen knew plaintiff was seeking letters First United sent to buyers and sellers of certificates of deposit. Mr. Dahlen's letter states:

> *Letters from United to buyers and sellers of certificates of deposit. . . .*
>
> You have, as you know, the letter sent to Brockton Savings. You have all of the correspondence sent by United to Penn Square. You have copies, finally, of the form letters used by United in marketing its service.
>
> I cannot imagine that you want me to send you a copy of every letter sent to everyone, and I am not about to do that anyway. If anything you do not now have were ever to become relevant and admissible—and I do not for a minute concede that it could be—, that would be a letter from United to some other banking institution saying something wrong

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[5] These documents were among those ordered produced by Judge Nelson by January 28

about Penn Square. My client tells me that no such letter exists.

(Greco Affidavit, Ex. 10.)

A hearing on the motion for sanctions was held on the morning of March 1. (Tr. of Hearing, Docket No. 138.) At that hearing, Attorney Dahlen submitted an affidavit of Christine Lynne Alexander, an employee of First United identified as an executive secretary. The affidavit indicated that eight form letters were used to communicate to prospective clients and these form letters were retained in a word processor memory. Copies of the actual correspondence sent to clients were not retained. (Docket No. 115.) This was the first indication given to the court, and Mr. Greco stated given to him (Greco Affidavit, ¶ 33), that these letters did not exist. These were the very letters which Mr. Greco left no doubt he was seeking at a hearing before me on October 18, at which time he specifically made reference to these letters. (See discussion, page 8, *supra.*)

A question was raised *sua sponte*, and also by Mr. Greco, as to whether these documents ever existed. I ordered Mr. Dahlen to bring his client, by its president Mr. Renda, and the affiant, Christine Lyne Alexander, into court.

THE COURT: You tell him to get on the shuttle and get up here. You tell him its a very serious matter and that I intend to take testimony from him under oath and while you are at it, you might as well bring up the woman who signed the affidavit. You're faced with a request for a default judgment on a million dollar purchase here. Now, I think you take it seriously. I'm sure you do. You are also faced with a request that you be held in contempt.

(Tr. 29-30)

The hearing was continued until 2:00 P.M.

Counsel appeared at 2:00 P.M. (Tr. of hearing, Docket Nos. 136, 138). Mr. Dahlen stated that he spoke to Stewart Steinburg [sic], in house counsel of First United. Mr. Steinburg [sic] advised him that Mr. Renda was traveling in California and could not be reached; the executive Vice President, Mr. DiCarlo was ill and could not travel; and he did not wish to send Ms. Alexander. (Tr. 33-34) Mr. Dahlen was advised of the gravity of the situation (Tr. 40-44), and the hearing was continued until Tuesday, March 6. He was ordered to produce his client and the affiant.

> THE COURT: I want your client produced in this courtroom—in this courtroom, under oath, and I want that affiant in this courtroom under oath. Now I want to make that clear. That's an order.

(Tr. 46)

On March 5, two additional affidavits were filed by First United, indicating the documents were not retained (Docket No. 121).

On March 6, counsel appeared without the client or the affiant. (Transcript of Hearing, Docket No. 137.) The following occurred:

> MR. DAHLEN: While we appreciate and thank you for the opportunity to produce live testimony, we choose to stand on the record as it now exists.
>
> THE COURT: You mistake your position. I ordered you to have your client and the affiant before the Court today.
>
> MR. DAHLEN: Taking your words as an order in that case Your Honor, my client chooses not to obey.
>
> THE COURT: And the affiant?
>
> MR. DAHLEN: Her, also, Your Honor.
>
> THE COURT: Have you advised your client and the affiant of the consequences of a refusal to obey

an order of the United States District Court in this case?

MR. DAHLEN: I have not spoken with the affiant, Your Honor. I have advised my client.

THE COURT: I directed you to speak to the affiant. Did you inform the affiant that she had been ordered to appear before this court this morning for testimony?

MR. DAHLEN: I did not inform her of that, Your Honor. I did not understand you to direct me to speak to her.

(Tr. 3-4)

I then indicated to counsel that I intended to recommend to the trial judge that a default judgment be entered. (Tr. 11)

On March 16, the law firm of Sullivan and Worcester filed an appearance on behalf of First United. Two hearings were held with new counsel on March 19 and 21, at which time counsel was given an opportunity to argue against a recommendation of default. (Tr. of Hearings, Docket Nos. 128, 129.) Detailed memoranda were submitted (Docket Nos. 130, 135).

II. DISCUSSION

Defendant raises several arguments as to why default should not be entered in this case. They are (1) the court had no authority to order Mr. Renda and the affiant to appear in Massachusetts; (2) the court is required to acknowledge affidavits in the absence of contrary evidence; and (3) the facts of this case are inadequate to justify an entry of default. Each argument is addressed below.

A. *Compelling Attendance in Massachusetts*

It is the position of the defendant that this court had no authority to compel the attendance of Mr. Renda or

the affiant on March 1 or 6, conceding that they were ordered to appear on March 6 and questioning the fact of an order on March 1. In support of its position that the court could not compel their appearance in Massachusetts, defendant relies on Fed.R.Civ.P. 45(3)(1) [sic], which provides in pertinent part:

> A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena.

Defendant argues that because Mr. Renda and the affiant were in New York, further than 100 miles from Boston, the court had no authority to compel their attendance, citing *GFI Computer Industries, Inc. v. Fry*, 476 F.2d 1 (5th Cir. 1973); *Steel Inc. v. Atchinson, Topeka & Santa Fe Railway Co.*, 41 F.R.D. 337 (D.Kan. 1967); and *Standard Metals Corp. v. Tomlin*, CCH Fed. Sec. Rep. ¶ 98,644 (S.D.N.Y. April 14, 1982), which hold that a court has no authority to compel a party to appear and testify at trial when the party is not within the district, or within 100 miles of the place of the trial.

I agree with plaintiff that defendant's reliance on Rule 45 and the above cited cases is misplaced. The court in the case at bar was not compelling attendance at trial, but was compelling attendance in the forum state for discovery proceedings. The present controversy is governed by Rules 30 and 37, and not by Rule 45.

Prior to March 1, several orders compelling discovery from the defendant were entered. The argument presented to the court by defense counsel over several months was premised on the existence of the documents in question. These documents were ordered produced. On March 1, an affidavit was presented by the defendant that the documents had not been retained. This complete reversal of the defendant's position raised serious questions as to

whether these documents had ever existed or whether they had been destroyed. Certainly, at this point, plaintiff's counsel could have compelled the attendance of Mr. Renda and the affiant at a deposition to testify with regard to these documents under Rule 30. Under Rule 30(b)(6), the corporation would have been required to produce one or more of its officers, directors, or managing agents, or other persons who consent to testify on its behalf. Although the general rule is that a defendant will be examined at his residence or place of business or employment, the court has discretion to order the testimony at the forum state for discovery purposes. 4 MOORE'S FEDERAL PRACTICE, ¶ 26.70 [1-3]; WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2112, p. 410; *Pinkham v. Paul*, 91 F.R.D. 613, 614 (D.Me. 1981); *In Re Agent Orange Product Liability Litigation*, 95 F.R.D. 192, 194 (E.D.N.Y. 1982); *Powell v. International Food Service Systems, Inc.*, 52 F.R.D. 205 (D.P.R. 1971); *Tomingas v. Douglas Aircraft Co.*, 45 F.R.D. 94, 97 (S.D.N.Y. 1968); *United States v. DeFrantz*, 708 F.2d 310 (7th Cir. 1983); *see also Atlantic Cape Fisheries v. Hartford Fire Insurance Co.*, 509 F.2d 577 (1st Cir. 1975).

If the defendant is attempting to suggest that the court could not do what a plaintiff has the right to do, i.e. to compel the attendance of the defendant in the forum state on discovery matters, the argument is rejected. At a hearing to determine if it was in defiance of a court order, the defendant submitted testimony to the court in the form of an affidavit indicating it was not in defiance of the court order because the documents ordered produced were "not retained." After months of conduct by defense counsel who argued consistently and vigorously why the documents were irrelevant, confidential, and should not be produced, the production of the affidavit with no rational explanation for the new claim of "not retained," raised serious doubts as to the truth

of its contents. I rejected it then and reject it now. The client and the affiant were ordered to appear so that a determination could be made as to whether the defendant was in defiance of the order to produce the documents, and as to the truth of the matters sworn to in the affidavit. The defendant chose not to obey, and now argues that the court was required to accept the affidavit as true, was required to ignore all inferences to the contrary, and was without the power to order the parties to appear. The defendant clutches at straws, but justice is neither so blind nor so helpless. A party, and one whose testimony by affidavit has been submitted in a discovery controversy, is before the court for all purposes. The power to compel further testimony, at least on the matter at issue, is inherent and so obvious as to require no citation of authority. In this type of situation, the Constitution itself offers ample protection during the course of such an inquiry.

B. *Acceptance of Defendant's Affidavits*

Defendant's second argument is that this court is bound to accept the truth of the affidavits submitted into evidence by the defendant because they are "uncontradicted." It further argues that because the affidavits state the letters do not exist, the court cannot impose sanctions for a failure to produce them.

Defendant's argument fails to recognize the prior conduct of defense counsel. The question is not whether the court can sanction a party for refusal to produce documents he does not have. It is clear that a court cannot do this. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958). Nor is the question whether a court can disregard an "uncontradicted" affidavit of a party stating it does not have possession of documents. This affidavit stands contradicted by the conduct and argument of defendant's own attorney.

At the October 18 hearing, plaintiff's attorney argued specifically for production of the letters. Defense counsel said nothing about them not being retained by his client, but instead argued against production of all documents on the basis of confidentiality and volume. When it came time for production, defendant's counsel moved for a protective order to preserve the confidentiality of the documents sought. At the January 18 hearing, counsel specifically requested that he be able to produce exemplars rather than the actual letters. This request was denied and Judge Nelson ordered the letters produced. On March 1, counsel then, contradicting his prior position, represented that the letters were not retained. This unexplained, abrupt reversal, with its brief questionable supporting affidavit from one later referred to as a low level employee, clearly warranted a searching inquiry as to the existence of the documents during prior proceedings and their deliberate destruction. If they indeed had not existed, then the arguments of counsel to prevent their production were a sham and a mockery.

The defendant suggests that the court's reliance during hearings on *Penthouse International, Ltd. v. Playboy Enterprises, Inc.*, 663 F.2d 371 (2nd Cir. 1981) was misplaced. It argues that in that case there was a contradiction with regard to the existence of documents between sworn statements and trial testimony, and therefore it is distinguishable from the case at bar where there is no sworn statement contradicting the affidavits. However, as suggested by the court in *Damiani v. Rhode Island Hospital*, 704 F.2d 12, 16 (1st Cir. 1983), the court is entitled to rely on the acts or omissions of an attorney. The court must be able to rely on conduct of an attorney and representations it makes to the court in oral argument. The client is bound by the acts of his lawyer.

Further, the court can draw an inference that defendant's failure to appear in court would reveal unfavorable

testimony.[6] *See Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350-351 (1909); *Brown v. Cedar Rapids and Iowa City Railway Co.*, 650 F.2d 159, 162, n.3 (8th Cir. 1981); *Kean v. Commissioner of Internal Revenue*, 469 F.2d 1183, 1188 (9th Cir. 1972).

C. *Default*

Defendant next argues that the facts in this case do not justify an entry of default. A summary of the facts which I rely on in recommending default are as follows. Defendant violated four orders of this court. First, Mr. Greco's affidavit indicates that on August 18, 1983, Judge Nelson ordered First United to produce, within ten days, a list identifying all Penn Square certificates of deposit transactions brokered by First United. This is not refuted. The defendant did not comply. Second, at a hearing on October 18, I ordered answers to interrogatories supplemented by November 23 and documents produced by December 5. Defendant never appealed this order. On November 23, incomplete supplemental answers were filed under seal, without a copy being served on plaintiff. A motion for a protective order was filed, a hearing was held before me on December 2, and I denied the motion for a protective order and a motion to stay. Defendant filed a motion for a protective order and a motion to stay with Judge Nelson. He served his incomplete answers on December 5, but no additional documents were produced. Third, at a conference before Judge Nelson on January 18, 1984, all documents were ordered produced within ten days. A specific request by defense counsel to produce exemplars rather than actual letters was denied. On January 27, some documents were produced. However, exemplars rather than actual letters were produced.

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[6] It should be noted that at the March 1 and 6 hearings, no objection was raised as to the power of the court to compel the attendance of Mr. Renda and the affiant. The first mention of this argument was by new counsel in a brief filed March 28, 1984.

It was not until February 16 that defendant produced confirmation slips. Fourth, on March 6, defendant failed to obey an order to appear in court. Defense counsel specifically stated his client chose not to obey the order.

Further, defense counsel failed to advise the court, or the plaintiff, of his client's claim that certain documents did not exist until March 1, months after plaintiff's attorney requested them and spent his time, and the court's time, in attempting to obtain them. There can be no doubt that these letters were sought, for plaintiff's counsel specifically made reference to these documents in open court on October 18.

Rule 37(b)(2)(C) provides for, "An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

The standard to be used by a court in determining whether dismissal or default is appropriate is discussed in *Damiani v. Rhode Island Hospital, supra.* In that case, plaintiff filed suit in June, 1980 seeking $1,500,000 in damages and injunctive relief alleging antitrust violations. An amended complaint was filed in March, 1981. In May, defendant served interrogatories and requests for production of documents on the plaintiff. Plaintiff filed no response. In July, defendant moved to compel and the district court, receiving no opposition, ordered the answers to interrogatories and the documents produced by July 27, and ordered plaintiff's counsel to appear on September 14 to show cause why attorney's fees should not be awarded to the defendant. Instead of complying with the order, plaintiff's counsel wrote defense counsel on July 27 and stated he was unable to respond by that time because he was on trial. Between then and August 17, several dates by which plaintiff's counsel said he would respond came and went without responses. On

August 21, defense counsel moved to dismiss and plaintiff filed an objection stating he did not answer because he was unexpectedly called out of town. A hearing was set for September 15, and prior to that that [sic] date, plaintiff filed answers to interrogatories and responses to the production of documents. Two hearings on the motion to dismiss were held in September, 1981 and March, 1982. Defendant argued the answers were inadequate. The district court dismissed the case, finding that the behavior of plaintiff's counsel amounted to wilful misconduct.

The First Circuit, quoting extensively from *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976), held that the district court did not abuse its discretion in imposing the sanction of dismissal. The court first stated that, although Fed.R.Civ.P. 37(b)(2) provides a variety of sanctions, nothing in the rule suggests that dismissal can be used only after all other sanctions have been considered or tried. It went on to quote the language from *National Hockey League.*

> The most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

Id. at 643. The *Damiani* court went on to state that:

> [N]ot only was there wilful disobedience of the court's order, but plaintiff's attorney arrogated control of discovery to himself and changed the date of compliance to suit his own convenience and that of his client. . . . The day has long since passed when we can indulge lawyers the luxury of conducting lawsuits in a manner and at a pace that best suits their convenience. The processing of cases must proceed expeditiously if trials are to be held at all.

Damiani, at 16. The court rejected the argument that the sins of the attorney should not be visited on the client. Quoting from *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-634 (1962), the court stated:

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." *Smith v. Ayer*, 101 U.S. 320, 326, 25 L.Ed. 955.

The teachings of *Damiani* are applicable to the facts in the case at bar. The defendant missed several deadlines imposed by order of the court. Defense counsel, after listening to argument of plaintiff's counsel for months as to why certain documents should be produced, failed to make any mention that these documents were not retained by his client, but instead argued against production on the basis of confidentiality or volume. Then, when confronted with the court's doubts as to the veracity of an affidavit produced on March 1 stating these documents were not retained, the defendant refused to appear in court to present oral testimony. Defendant's behavior constituted wilful disobedience of the court.[7]

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[7] The language regarding deterrence in *National Hockey League* has been cited in support of the proposition that failure to comply with discovery orders because of gross negligence, even in the absence of actual bad faith, can justify dismissal or default under Rule 37. *Cine Forty-Second Street Treatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062 (2nd Cir. 1979); *Accord: Affanato v. Merrill Brothers*, 548 F.2d 138 (1st Cir. 1977); *Contra: Edgar v. Slaughter*, 548 F.2d 770 (8th Cir. 1977). However, I do not reach that question since I find the conduct of the defendant in this case amounted to wilful disobedience.

Defendant has attempted to distinguish the *Damiani* decision on several points. First, it argues that the facts leading to the dismissal are distinguishable. I agree that the facts in *Damiani* are not the same as the facts of this case. The conduct of the defendant in the case at bar in disregarding orders of the court is more egregious than that in *Damiani*. As pointed out by the plaintiff, the plaintiff in *Damiani* was sanctioned for essentially disobeying only one order of the court.

Second, I reject the defendant's attempt to make the reasoning in *Damiani* inapplicable to the case at bar on the ground that in *Damiani* there was a dismissal against the plaintiff, while in the case at bar the court would be defaulting the defendant. Rule 37 provides for both dismissal and default. In *Affanato v. Merrill Brothers*, *supra*, at 141, the First Circuit upheld a default judgment awarding plaintiff $142,500.00, stating, "We think the policy considerations enunciated by the Supreme Court in *National Hockey League* are fully applicable to defaults under Rule 37(b)(2)(C)." In *Damiani*, *supra*, at 17, the court noted other cases in which dismissals have been upheld,[8] including default judgments. *Eisler v. Stritzler*, 535 F.2d 148, 153 (1st Cir. 1976); *Local Union No. 251 v. Town Line Sand & Gravel, Inc.*, 511 F.2d 1198, 1199 (1st Cir. 1975); *see also Kozlowski v. Sears Roebuck & Co.*, 73 F.R.D. 73 (D.Mass. 1976).

In support of its argument that the distinction between default and dismissal is important, defendant alludes to a constitutional argument addressed by the Supreme Court in *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357

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[8] The court noted that in only one case since 1962 had it reversed an order of dismissal. In *Richmond v. General Motors Corp.*, 437 F.2d 196 (1st Cir. 1971), the court held a trial judge's dismissal of an action for want of prosecution constituted too harch a sanction.

U.S. 197 (1958).[9] (Memorandum of Defendant First United Fund Ltd. in Opposition to Plaintiff's Motion for Sanctions, Docket No. 130, p. 32.) In *Rogers*, the Court stated that Rule 37 must be read in the light of the Fifth Amendment provision that no person shall be deprived of property without due process of law. *Id.* at 209. *See generally*, 4A MOORE'S FEDERAL PRACTICE, ¶ 37.03[2-1]; WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 2283. The Court discussed its prior decisions involving constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case.

> In *Hovey v. Elliott*, [167 U.S. 409 (1897)], it was held that due process was denied a defendant whose answer was struck, thereby leading to a decree *pro confesso* without a hearing on the merits, because of his refusal to obey a court order pertinent to the suit. This holding was substantially modified by *Hammond Packing Co. v. Arkansas*, [212 U.S. 322 (1909)], where the Court ruled that a state court, consistently with the Due Process Clause of the Fourteenth Amendment, could strike the answer of and render a default judgment against a defendant who refused to produce documents in accordance with a pretrial order. The *Hovey* case was distinguished on grounds that the defendant there was denied his right to defend "as a mere punishment"; due process was found preserved in *Hammond* on the reasoning that the State simply utilized a permissible presumption that the refusal to produce material evidence ". . . was but an admission of the want of merit in the asserted defense." 212 U.S. at 350-351. But the Court took care to emphasize that the de-

[9] Although this argument is alluded to by the defendant, it never specifically argues that a default judgment in this case would violate due process.

> fendant had not been penalized ". . . for a failure to do that which it may not have been in its power to do." All the State had required "was a *bona fide* effort to comply with an order . . . , and therefore any reasonable showing of an inability to comply would have satisfied the requirements . . ." of the order. 212 U.S., at 347.

Rogers, supra, at 209-210. The Court in *Rogers* went on to state:

> Certainly substantial constitutional questions are provoked . . . . Their gravity is accented in the present case where petitioner, though case in the role of *plaintiff*, cannot be deemed to be in the customary role of a party invoking the aid of a court to vindicate rights asserted against another. Rather a petitioner's position is more analogous to that of a *defendant*, for it belatedly challenges the Government's action by now protesting against a seizure and seeking the recovery of assets.

Id. at 210.

The court then held that Rule 37 cannot be construed to authorize dismissal of a complaint because of a party's non-compliance with a pretrial production order "when it has been established that failure to comply has been due to inability, and not wilfulness, bad faith, or any fault" of the party. *Id.* at 212.

Some commentators have suggested that the constitutional limitations on sanctions as yet have not been well defined. As stated in 4A MOORE'S FEDERAL PRACTICE, ¶ 37.03[2], pp. 37-61, 62:

> The precise limits of the restriction placed upon use of sanctions by the *Hovey* and *Rogers* cases are not easy to state. The preservation in *Rogers* of the presumption rationale of the *Hammond* decision suggests that the Court may be reluctant to endorse im-

> position of sanctions that dispose of a case without reference to the merits, independent of the level of willful disobedience. Thus when the facts taken as established under Rule 37(b)(2)(A), or the evidence excluded under 37(b)(2)(B), or the portion of the case dismissed under 37(b)(2)(C) are elements of the dispute that cannot be determined on the merits without disclosure of the evidence the court has ordered the party to produce, it can be said that the *Hammond* presumption applied. If, on the other hand, the fact taken as established, the evidence excluded, or the issue subject to default or dismissal has no connection with the information the party has neglected to supply, the sanction might be looked upon as mere punishment interdicted under the *Hovey* rule. When there is a refusal to supply information on any topic, such as a failure to appear for the taking of depositions, it is reasonable to apply the presumption to the party's entire case.

See also WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURES: CIVIL § 2289, p. 765. Further, this circuit in *Damiani, supra,* at 16, suggested that the holding in *Rogers* may have been eroded by *National Hockey League.* In any event, I find that a default judgment in this case, scrutinized under the Supreme Court cases, *supra,* would not come within the holding of *Rogers* and would not violate due process.[10]

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[10] *See Emerick v. Fenick Industries, Inc.,* 539 F.2d 1379 (5th Cir. 1976), where the court held that a district court did not abuse its discretion, and due process was not violated, when defendant was defaulted for failure to comply with discovery orders, even though defendant contended it had complied with order and was unable to comply with request for ledgers and journals because it kept its business records by computer which were available only on a codified computer printout. This fact was not raised by defendant until approximately five months after the court's order to produce.

In summary, I am satisfied that the defendant has wilfully disobeyed the discovery orders of this court; has either misled the court and the plaintiff through malice or incompetence as to the existence of the documents in question; has deliberately refused to appear and testify when ordered to do so with reference to this late dubious claim of non-retention; and has abused and frustrated the discovery process at great cost to the plaintiff and the court. I am satisfied that a default judgment should be entered, and a hearing should be held on the assessment of damages.[11]

D. *Fees*

Plaintiff's counsel has submitted an affidavit setting forth the time spent by counsel in connection with First United's refusal to provide discovery. This is opposed. I am satisfied that costs and reasonable expenses, including attorney's fees, should be assessed against the defendant and defendant's prior counsel, Mr. Dahlen, in equal proportions in accordance with Fed.R.Civ.P. 37(b)(2). The defendant correctly argues that prior to such assessment, a hearing is required as to the amount.

E. *Contempt*

The main distinction between civil and criminal contempt is the purpose that each serves. Sanctions in civil contempt may be used for either or both of two purposes: (1) to coerce the defendant into compliance with the court's order, and (2) to compensate the complainant for losses sustained. *United Mine Workers, supra,* at 303-304, citing *Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 448-449 (1911). Civil contempt sanctions may not be imposed for the purpose of vindicating the court's authority. They are not punitive but are purely reme-

[11] In accordance with *Eisler v. Stritzler, supra,* at 153-154, and Fed.R.Civ.P. 55(b)(2), a hearing must be held at which time it is incumbent upon plaintiff to establish its damages.

dial. *Merriam Co. v. Webster Dictionary Co., Inc.*, 639 F.2d 29, 41 (1st Cir. 1980). Civil contempt proceedings are instituted by the aggrieved party and that party controls the course of the proceedings. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2960, pp. 587-588.

In view of these two permissible purposes, assuming the recommendation for default is adopted, the sanction of civil contempt would not be appropriate herein. As to the first purpose stated, i.e., to coerce the party into compliance with the court's order, "a civil contempt proceeding becomes moot upon termination of the underlying controversy that gave rise to the litigation from which it stemmed." WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2nd, § 705, p. 830; *Gompers, supra*, at 452; *Danning v. Lavine*, 572 F.2d 1386, 1389 (9th Cir. 1978). Since the underlying need for the documents and testimony of the defendant would be mooted by the entry of default, civil contempt proceedings must necessarily end. If the recommendation of default is not adopted, then civil contempt proceedings would be appropriate.

Second, if the intended purpose of contempt proceedings is to seek compensation for the complainant for losses sustained, it does not appear that the court need resort to contempt proceedings in this case to attain that goal. In its memorandum, plaintiff outlines the losses sustained as a result of the defendant's discovery abuses. They are: (1) delayed prosecution of the case for nearly one year; (2) deprivation of the use of the outstanding balance of the Penn Square CD for an additional twelve months, and (3) an excess of over $30,000 in legal fees. (Plaintiff's Supplemental Memorandum in Support of Motion for Sanctions, Docket No. 132, pp. 37-39.) However, Rule 37(b)(2) specifically provides for the compensation of expenses without resort to contempt proceedings. It provides in pertinent part:

> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Under that provision, on the facts of this case, an award of attorney's fees and expenses is required. Thus, sanctions for contempt would be merely duplicative and arguably punitive.

III. CONCLUSION

For the foregoing reasons, it is RECOMMENDED that (1) default be entered against the defendant First United; (2) the plaintiff be awarded, after a hearing, reasonable expenses, including attorney's fees; (3) if the sanctions of default and costs are not imposed, then proceedings should be conducted on the issue of contempt.

/s/ Robert I. deGiacomo
United States Magistrate

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-0478-N

BROCKTON SAVINGS BANK,
Plaintiff,

v.

PEAT, MARWICK, MITCHELL & CO., *et al.*,
Defendants.

ORDER

NELSON, D.J. August 9, 1984

The May 14, 1984 Memorandum and Recommendation of Magistrate DeGiacomo regarding plaintiff's motion for sanctions against defendant, First United Fund, Ltd., is hereby adopted. A judgment by default shall enter against defendant, First United Fund, Ltd. Expenses and counsel fees shall be awarded to plaintiff in accordance with the affidavit submitted by plaintiff's counsel and following a hearing on the submitted affidavit, unless waived.

SO ORDERED.

/s/ David S. Nelson
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-0478-N

Magistrate No. 1180-84-D

BROCKTON SAVINGS BANK

v.

PEAT, MARWICK, MITCHELL & CO., *et al.*

RECOMMENDATION RE PLAINTIFF BROCKTON SAVINGS BANK'S REQUEST FOR THE IMMEDIATE ENTRY OF JUDGMENT

January 29, 1985

DeGIACOMO, U.S.M.

Following a hearing with evidence limited solely to the accuracy of and method used in the computations in the affidavit of Robert A. LaVoie, Treasurer of the Brockton Savings Bank (Docket No. 157), he being in court and available to testify, and counsel having agreed that said affidavit supplemented by his affidavit submitted in open court at a further hearing on January 29, 1985 are mathematically accurate, it is RECOMMENDED that judgment be entered in favor of plaintiff Brockton Savings Bank and against defendant First United Fund, Ltd., in the amount of $783,868.63, plus costs and attorneys' fees.

/s/ Robert I. deGiacomo
United States Magistrate

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 83-0478-N

BROCKTON SAVINGS BANK,
Plaintiff,

v.

PEAT, MARWICK, MITCHELL & CO.
JAMES BLANTON, C. DEAN YORK, and
FIRST UNITED FUND, LTD.,
Defendants.

JUDGMENT

There being no just reason for delay, pursuant to Rule 54(b), Fed. R. Civ. P., Judgment is hereby entered in favor of plaintiff Brockton Savings Bank and against defendant First United Fund, Ltd., in the amount of $783,868.63, plus costs and attorneys' fees.

The amount of costs and attorneys' fees shall be determined at a hearing to be scheduled forthwith.

By the Court

/s/ David S. Nelson
(NELSON, J.)
United States District Judge

Date: January 29, 1985

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 85-1174

BROCKTON SAVINGS BANK,
Plaintiff, Appellee,

v.

PEAT, MARWICK, MITCHELL & CO., *et al.*,
Defendants, Appellees.

FIRST UNITED FUND, LTD.,
Defendant, Appellant.

JUDGMENT

Entered: August 26, 1985

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ Francis P. Scigliano
Clerk

[cc: Messrs. Lev and Greco]

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 85-1174

BROCKTON SAVINGS BANK,
Plaintiff, Appellee,

v.

PEAT, MARWICK, MITCHELL & CO., *et al.*,
Defendants, Appellees,

FIRST UNITED FUND, LTD.,
Defendant, Appeliant.

Before

Campbell, *Chief Judge*,

Coffin, Bownes, Rubin*, Breyer and Torruella,

Circuit Judges.

ORDER OF COURT

Entered: October 7, 1985

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and

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* Of the Fifth Circuit, sitting by designation.

the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the suggestion for rehearing en banc be hereby denied.

By the Court:

/s/ Francis P. Scigliano
Clerk

[cc: Messrs. Lev and Greco]

APPENDIX E

DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

RULE 37, FEDERAL RULES OF CIVIL PROCEDURE

Failure to Make or Cooperate in Discovery: Sanctions

(a) *Motion for order compelling discovery.* A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a dependent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be per-

mitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or incomplete answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of expenses of motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) *Failure to comply with order.*

(1) *Sanctions by court in district where deposition is taken.* If deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraph (A),

(B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) *Expenses on failure to admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take

any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) [Abrogated]

(f) [Repealed. Pub.L. 96-481, Title II, § 205(a), Oct. 21, 1980, 94 Stat. 2330]

(g) *Failure to participate in the framing of a discovery plan.* If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

RULE 45, FEDERAL RULES OF CIVIL PROCEDURE

Subpoena

(a) *For Attendance of Witnesses; Form; Issuance.* Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) *For Production of Documentary Evidence.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) *Service.* A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.

(d) *Subpoena for Taking Depositions; Place of Examination.*

(1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. Proof of service may be made by filing with the clerk of the district court for the district in which the deposition is to be taken a copy of the notice together with a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by

Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) [Effective until August 1, 1985. See, also, subdivision (d)(2) below.] A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

(2) [Effective on August 1, 1985. See, also, subdivision (d)(2) above.] A person to whom a subpoena for the taking of a deposition is directed may be required to attend at any place within 100 miles from the place where that person resides, is employed or transacts business in person, or is served, or at such other convenient place as is fixed by an order of court.

(e) *Subpoena for a Hearing or Trial.*

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk

of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena, or at a place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place where the district court is held. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783.

(f) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

RULE 55, FEDERAL RULES OF CIVIL PROCEDURE

Default

(a) *Entry*

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) *Judgment*

Judgment by default may be entered as follows:

(1) *By the clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a

sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) *By the court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) *Setting aside default*

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) *Plaintiffs, counterclaimants, cross-claimants*

The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-

party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) *Judgment against the United States*

No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

RULE 60, FEDERAL RULES OF CIVIL PROCEDURE

Relief From Judgment or Order

(a) *Clerical mistakes*

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.*

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied,

released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

83-0478-N

BROCKTON SAVINGS BANK,
Plaintiff

v.

PEAT, MARWICK, MITCHELL & CO.,
a Partnership; JAMES BLANTON; C. DEAN YORK;
FIRST UNITED FUND, LTD.,
Defendants

[Filed Feb. 24, 1983]

COMPLAINT

(Jury Trial Demanded)

I. NATURE OF THE ACTION

1. This is an action to recover damages resulting from violations of Section 10(b) of the Securities Exchange Act of 1934 ("the Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 (17 C.F.R. 240.10b-5) promulgated thereunder by the Securities and Exchange Commission ("SEC"); violations of Section 17(a) of the Securities Act of 1933 ("the Securities Act"), 15 U.S.C. § 77q(a); violations of Section 12(2) of the Securities Act, 15 U.S.C. § 771(2); violations of Mass. Gen. Laws, Chapter 110A; violations of the Oklahoma Securities Act, 71 Okl. Stat. § 1, *et seq.;* common law fraud; common law

negligence; and violations of Mass. Gen. Laws, Chapter 93A in connection with the purchase by plaintiff of a certificate of deposit from Penn Square Bank, N.A.

II. JURISDICTION AND VENUE

2. Jurisdiction over the subject matter of this action is predicated on Section 27 of the Exchange Act (15 U.S.C. § 78aa); on Section 22(a) of the Securities Act (15 U.S.C. § 77v(a)); on 28 U.S.C. § 1331; and on the pendent jurisdiction of this Court.

3. Jurisdiction over the subject matter of this action is also grounded on 28 U.S.C. § 1332, in that there is diversity of citizenship between the parties.

4. The amount in controversy exceeds the sum of $10,000, exclusive of interest and costs.

5. Venue is based on Section 27 of the Exchange Act (15 U.S.C. § 78aa); on Section 22(a) of the Securities Act (15 U.S.C. § 77v(a); and on 28 U.S.C. § 1391. The defendants transact business within the district of this Court; the sale of the certificate of deposit involved in this action, as well as other acts and transactions constituting the violations hereinafter alleged, took place in this district; and the causes of action hereinafter alleged arose within this district.

III. THE PARTIES

6. The plaintiff, Brockton Savings Bank ("BSB") is, and at all times material hereto was, a savings bank incorporated under the laws of Massachusetts with its principal place of business located in Brockton, Massachusetts.

7. The defendant, Peat, Marwick, Mitchell & Co. ("Peat Marwick") is, and at all times material hereto was, a national partnership of independent certified public accountants with its place of organization in the City of New York, State of New York. Peat Marwick has

an office in the District of Massachusetts, located at One Boston Place, Boston, Massachusetts, and transacts business in said district.

8. The defendant, James Blanton ("Blanton") is, and at all times material hereto was, a resident of Oklahoma, a certified public accountant, a partner of Peat Marwick, and managing partner of Peat Marwick's Oklahoma City office.

9. The defendant, C. Dean York ("York") is, and at all times material hereto was, a resident of Oklahoma and a partner of Peat Marwick.

10. The defendant, First United Fund, Ltd. ("First United") is, and at all times material hereto was, a corporation organized under the laws of the State of New York with its principal place of business located at 1001 Franklin Avenue, Garden City, New York. First United is, and at all times material hereto was, a broker-dealer registered with the SEC and engaged in the business, *inter alia*, of brokering money instruments and other securities.

IV. FACTUAL BACKGROUND

A. *OCC Examinations and the Collapse of Penn Square Bank, N.A.*

11. Penn Square Bank, N.A. ("Penn Square") was chartered in 1960 as a National Banking Association organized and existing under the laws of the United States, and at all times material hereto its principal place of business was located at 1919 Penn Square, Oklahoma City, Oklahoma.

12. First Penn Corporation ("First Penn") is a bank holding company organized and existing under the laws of the State of Oklahoma with its principal place of business located at 1919 Penn Square, Oklahoma City, Oklahoma. At all times material hereto, Penn Square was a wholly owned subsidiary bank of First Penn.

13. From March 3, 1980 to April 4, 1980, the Office of the Comptroller of the Currency ("OCC") conducted a specialized examination of Penn Square as of February 29, 1980 ("February 1980 specialized examination"). This examination revealed numerous deficiencies in Penn Square, including, *inter alia*, rapid and uncontrolled growth of bank loans and assets, insufficient liquidity, inadequate capital, an increase in classified assets, violations of the banking laws, poor funds management and understaffing of the institution. As a result of this examination, the OCC gave Penn Square a rating of "3" on the Uniform Financial Institution Rating System, which meant that the bank exhibited a combination of financial, operational or compliance weaknesses ranging from moderately severe to unsatisfactory.

14. On or about June 9, 1980, the Deputy Regional Administrator of the OCC forwarded the report of the February 1980 specialized examination to the Penn Square Board of Directors identifying certain of the major problems and directing that the Board take remedial action.

15. On or about August 27, 1980, the Penn Square Board of Directors met with representatives of the OCC at the OCC's Dallas Regional Office to discuss the results of the February, 1980 specialized examination. At that meeting, the OCC discussed the bank deficiencies and presented to and reviewed with the directors a formal administrative agreement ("Administrative Agreement") outlining the measures required to correct those deficiencies.

16. On or about September 9, 1980, all directors of Penn Square individually signed and consented to the Administrative Agreement, which required the following measures, among others:

> (a) Correct all violations of law and establish procedures to ensure that similar violations do not occur in the future.

(b) Develop and implement specific plans to ensure that the equity capital of Penn Square Bank will be increased to and maintained at a minimum of 7.5 per cent of average total daily assets.

(c) Obtain and maintain current and satisfactory credit information and correct all collateral exceptions.

(d) Not grant applications for new loans, renewals or other extensions of credit unless current and satisfactory credit information is available and unless such applications are fully supported by necessary collateral documentation.

(e) Establish a program for the elimination of criticized assets and not extend additional credit to any borrower whose extension of credit has been or becomes criticized.

(f) Revise the lending policy and establish and implement procedures to monitor and enforce adherence to the lending policy. The revisions were to include:

(i) Guidelines for the purchase and sale of loan participations.

(ii) Procedures for identifying problem loans and for reporting this information to the Board of Directors.

(iii) Identification of the categories of loans where concentrations of credit would be permitted and the limits thereto.

(iv) Procedures to limit, control and document contingent liabilities.

(g) Perform a management study by the Board of Directors, or a committee thereof, to evaluate current management and make appropriate adjustments to the current management structure.

(h) Review Penn Square's Allowance for Possible Loan Losses on at least a quarterly basis to ensure that the Allowance is maintained at an adequate level commensurate with the risks and potential for loss inherent in the loan portfolio of Penn Square.

(i) Develop and adopt a written liquidity, asset, and liability management policy to maintain the liquidity of Penn Square at a level commensurate with prudent banking practices and with the needs of Penn Square.

17. From January 5, 1981 to February 27, 1981, the OCC conducted a general examination of the condition of Penn Square as of December 31, 1980 ("December, 1980 general examination"). The results of this examination showed significant further deterioration in the condition of the bank and a substantial failure on the part of the bank to comply with the terms of the Administrative Agreement. The OCC once again gave Penn Square a rating of "3" on the Uniform Financial Institutions Rating System.

18. On or about July 1, 1981, the Regional Administrator sent a letter to the Penn Square Board of Directors identifying the problems uncovered in the December, 1980 general examination and demanding action.

19. On July 29, 1981, the Board of Directors of Penn Square as well as some representatives of management met with representatives of the OCC in the Dallas Regional Office to discuss the results of the December, 1980 general examination. The OCC representatives reviewed in detail the deficiencies and the areas of noncompliance with the Administrative Agreement.

20. From October 8, 1981 to October 30, 1981, the OCC conducted a special supervisory examination of the condition of Penn Square as of September 30, 1981 ("September, 1981 special examination"). Although the

examination revealed some improvement in the condition of the bank and the initiation of procedures to correct some of the problems, the OCC reported areas of continuing concern. The OCC once again gave Penn Square a rating of "3" on the Uniform Financial Institutions Rating System.

21. On or about December 1, 1981, the OCC Regional Administrator forwarded the report of the September, 1981 special examination to the Penn Square Board of Directors.

22. On January 12, 1982, OCC representatives met with the Board of Directors of Penn Square to discuss the results of the September, 1981 special examination, at which time the OCC highlighted the problems.

23. Starting on April 19, 1982, the OCC conducted a general examination of Penn Square. That examination revealed significant serious deterioration in the condition of the bank. At a special meeting of the Penn Square Board of Directors held on July 1, 1982, OCC representatives reported the following serious problems: numerous lending limit violations; heavy and constant overdrafts; an excessive number of past due loans; poor loan documentation and numerous collateral exceptions; inadequate loan loss reserves; insufficient liquidity; inadequate administrative controls; and lack of independence in the internal audit function. In addition, the OCC representatives questioned the external audit of Peat Marwick and in particular Peat Marwick's *unqualified* audit opinion on the grounds that Peat Marwick had not reviewed the energy portfolio which represented 80% of Penn Square's portfolio and because Peat Marwick had based many of its findings on the internal audit which also had not reviewed the energy portfolio.

24. On June 30, 1982, the OCC issued a cease and desist order, ordering the Penn Square Board of Directors, among other things, to:

(a) Provide Penn Square with $30,000,000 in new equity capital not later than July 9, 1982.

(b) Comply with the lending limit provisions of the National Bank Act, 12 U.S.C. Section 84.

(c) Correct collateral and documentation deficiencies with respect to all loans including participation loans.

(d) Stop extending additional credit to any borrowers whose loans or other extensions of credit were criticized.

(e) Stop making loans, loan commitments or other extensions of credit without first obtaining full collateral documentation and current and satisfactory credit information with respect to the borrower.

(f) Stop making any commitments to extend credit whether for a fee or otherwise without first arranging firm sources with which to fund it.

(g) Engage independent qualified auditors to reconcile various asset accounts of Penn Square and conduct certain verifications.

(h) Stop selling any participation in any extension of credit unless the loan and collateral documentation is in conformity with the terms of the participation agreement and the potential participant is first informed of all material facts with respect to the borrower and the credit.

(i) Stop permitting officers without lending authority to extend credit or make commitments on behalf of Penn Square.

25. On July 5, 1982, the United States Comptroller of the Currency, pursuant to the authority granted by 12 U.S.C. § 191 and § 1821, declared Penn Square to be insolvent, terminated its existence as a National Bank-

ing Association and appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver.

26. The plaintiff BSB was not aware of the OCC examinations or the results of those examinations described in Paragraphs 11 through 25 of this Complaint until after the OCC closed Penn Square on July 5, 1982.

B. *BSB Purchase of Penn Square CD and Subsequent Loss*

27. On April 28, 1982, BSB, in reliance on the fraudulent and negligent misrepresentations and omissions of defendants Peat Marwick, Blanton, York and First United hereinafter alleged, purchased a 90-day certificate of deposit from Penn Square in the amount of one million dollars at an interest rate of 16% and with a maturity date of July 27, 1982 (hereinafter, this certificate of deposit will be referred to as the "Penn Square CD").

28. BSB was holding the Penn Square CD on July 5, 1982 when the Comptroller of the Currency declared Penn Square insolvent and appointed the FDIC receiver of the bank.

29. To date, BSB has received—from the FDIC—only one hundred thousand dollars ($100,000.00) of its investment, representing that portion of the Penn Square CD which was insured by the FDIC.

V. CLAIMS FOR RELIEF

A. *FIRST COUNT* (Against Peat Marwick, Blanton and York—Section 10(b) and Rule 10b-5)

30. This First Count is brought against defendants Peat Marwick, Blanton and York, under Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder, to enforce rights belonging to BSB by reason of

material misrepresentations and omissions made in connection with the purchase by BSB of the Penn Square CD.

31. Plaintiff repeats and incorporates herein by reference the allegations contained in Paragraphs 1 through 29 of this Complaint.

32. BSB is informed and believes and therefore avers that at the time it purchased the Penn Square CD, a large majority of the assets of Penn Square consisted of loans made to entities which had borrowed money to finance oil and gas exploration and production ventures (hereinafter, these entities will be referred to as "oil and gas borrowers"), and that many of these loans were among those that the OCC, as a result of its April, 1982 general examination of Penn Square, decided should be charged off, a decision which led to the declaration of Penn Square's insolvency on July 5, 1982.

33. BSB is informed and believes and therefore avers that BSB's purchase of the Penn Square CD was in effect an investment in a common enterprise consisting of Penn Square and its oil and gas borrowers, a common enterprise funded directly or indirectly through the proceeds obtained from sales of certificates of deposit, including the Penn Square CD, and that the security of BSB's investment in the Penn Square CD depended directly or indirectly on the success of the oil and gas ventures involved in this common enterprise.

34. The Penn Square CD constitutes a security within the meaning of Section 3(a)(10) of the Exchange Act, 15 U.S.C. § 78c(a)(10), and Section 2(1) of the Securities Act, 15 U.S.C. § 77b(1).

35. In December 1981, defendant Peat Marwick was engaged to audit the First Penn and Penn Square financial statements for the fiscal year ending December 31, 1981. BSB is informed and believes and therefore avers

that Peat Marwick's Oklahoma City office, of which defendant Blanton was managing partner, was primarily responsible for conducting the audit;. that defendant Blanton was in overall charge of Peat Marwick's relationship with First Penn and Penn Square; and that defendant York was engagement partner in charge of and directly responsible for the audit.

36. In its March 19, 1982 audit report for First Penn and Penn Square and in its May 4, 1982 letter to the Board of Directors of Penn Square, defendant Peat Marwick represented that it undertook and discharged the following responsibilities in connection with its engagement by Penn Square:

> (a) To examine the consolidated and parent-only financial statements of First Penn and subsidiaries and the consolidated balance sheet of Penn Square and subsidiary as of December 31, 1981 (hereinafter, these financial statements and balance sheet will be referred to collectively as the "1981 Penn Square financials") in accordance with generally accepted auditing standards, including such tests of the accounting records and such other auditing procedures as Peat Marwick considered necessary in the circumstances.
>
> (b) To render an opinion whether the 1981 Penn Square financials fairly presented the consolidated and parent-only financial position of First Penn and subsidiaries at December 31, 1981 and the results of their operations and the changes in their financial position for the year then ended and fairly presented the consolidated financial position of Penn Square Bank, N.A. and subsidiary at December 31, 1981 in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

(c) To review Penn Square's organizational objectives, policies and procedures, information systems, internal reporting, internal audit controls and loan administration and to report the results of the review and make recommendations to the Penn Square Board of Directors and management.

37. On March 19, 1982, defendant Peat Marwick rendered an audit report (hereinafter, the "Peat Marwick report") containing its *unqualified* opinion that the consolidated and parent-only financial statements of First Penn and its subsidiaries and the consolidated balance sheet of Penn Square and subsidiary fairly presented the consolidated and parent-only financial position of First Penn and subsidiaries at December 31, 1981, the results of their operations and the changes in their financial position for the year then ended and fairly presented the consolidated financial position of Penn Square and subsidiary at December 31, 1981, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

38. The Peat Marwick report made the following representations of material fact, among others:

(a) That the 1981 Penn Square financials fairly presented the financial positions, results of operations, stockholders equity, and changes in financial positions of First Penn and Penn Square, in accordance with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

(b) That the 1981 Penn Square financials had been audited by Peat Marwick in accordance with generally accepted auditing standards.

(c) That the documentation of supporting collateral values for loans, as well as Penn Square's internal audit and loan review functions, were suffi-

cient for Peat Marwick to render an opinion as to the adequacy of the allowance for possible loan losses.

39. BSB is informed and believes and therefore avers that each of the representations set forth in Paragraph 38 hereof constituted an untrue statement of material fact and operated as a fraud and deceit on the plaintiff, in that:

(a) The 1981 Penn Square financials did not fairly present the financial positions, results of operations, stockholders equity and changes in financial positions of First Penn and Penn Square for the following reasons, among others:

(1) The amount designated as an allowance for possible loan losses appearing on the Penn Square financials was inadequate and contained material weaknesses.

(2) The Penn Square financials failed to disclose the existence of and results of the OCC investigations described in Paragraphs 11-25 of this Complaint.

(3) The Penn Square financials failed to disclose that as of December 31, 1981 and as of March 19, 1982, the date that defendant Peat Marwick rendered its audit report, the Penn Square loan portfolio contained an unreasonably large volume of past due loans.

(4) The Penn Square financials failed to disclose that the volume of overdrafts had been and continued to be unreasonably high.

(5) The Penn Square financials failed to disclose that Penn Square's internal controls were inadequate, and in particular that its internal audit department was not well administered, was not independent and did not provide an

adequate internal audit function and that its system of administrative controls was inadequate to ensure the security of Penn Square assets and the adherence to and proper implementation of prescribed rules and policies.

(6) The Penn Square financials failed to disclose that Penn Square had made and was continuing to make periodic payments of interest and/or principal on certain loans in which it had sold loan participations to its correspondent or co-participating banks without first having received payments from the borrowers.

(b) The 1981 Penn Square financials had not been audited by Peat Marwick in accordance with generally accepted auditing standards for the following reasons, among others:

(1) Peat Marwick was not independent with respect to its audit of the 1981 Penn Square financials.

(2) Peat Marwick, Blanton and York failed to exercise due care and objective judgment with respect to the audit generally and, in particular, in connection with assessing the adequacy of the allowance for possible loan losses.

(3) Peat Marwick, Blanton and York failed to employ adequate auditing techniques and procedures and relied unreasonably on Penn Square's internal controls, including its internal audit function.

(c) The documentation of supporting collateral values for loans, as well as Penn Square's internal audit and loan review functions, were insufficient for Peat Marwick to render an opinion as to the adequacy of the allowance for possible loan losses.

40. The Peat Marwick report omitted to state, as qualifications on the opinion contained therein, the material facts alleged in Paragraph 39(a)(1)-(6) of this Complaint, among others, which were necessary in order to make the statements made in that report, in light of the circumstances under which they were made, not misleading. The failure to state those material facts operated as a fraud and deceit on the plaintiff.

41. During the period of defendant Peat Marwick's engagement by Penn Square and at the time defendant Peat Marwick rendered its audit report, defendants Peat Marwick, Blanton and York knew that Arthur, Young & Company ("Arthur Young"), which had examined the consolidated financial statements of First Penn and Penn Square and the parent-only financial statements of First Penn the previous year, had issued a *qualified* opinion, dated March 13, 1981, because Arthur Young was unable to satisfy itself that the reserve for possible loan losses at December 31, 1980 was adequate due to the lack of supporting documentation of collateral values of certain loans. During the period of defendant Peat Marwick's engagement and at the time Peat Marwick rendered its audit report, defendants Peat Marwick, Blanton and York had actual or constructive knowledge of the results of the OCC examinations of Penn Square described in Paragraphs 11-22 of this Complaint; had actual or constructive knowledge that the OCC had entered into an Administrative Agreement with Penn Square with which Penn Square and the Penn Square Board of Directors had failed to comply; and had actual or constructive knowledge that the OCC had given Penn Square a rating of "3" on the Uniform Financial Institutions Rating System in connection with three separate examinations of Penn Square.

42. BSB is informed and believes and therefore avers that defendants Peat Marwick, Blanton and York knew or were reckless in not knowing that the statements of

material fact set forth in Paragraph 38 of this Complaint were untrue, as described in Paragraph 39, and that the Peat Marwick report should have stated the material facts set forth in Paragraph 39(a)(1)-(6) of this Complaint in order to make the statements that were made in that report not misleading.

43. During Peat Marwick's engagement by Penn Square and at the time Peat Marwick rendered its March 19, 1982 audit report, defendants Peat Marwick, Blanton and York knew that Penn Square had sold certificates of deposit in the past and was likely to continue to sell certificates of deposit in the future, and knew or should have known that purchasers, including BSB, of large, mostly uninsured certificates of deposit would or were likely to rely on the statements and information regarding the condition of Penn Square contained in the Peat Marwick report and Penn Square financials when making their purchases.

44. BSB purchased the Penn Square CD in justifiable reliance on the accuracy and completeness of the statements of fact contained in the Peat Marwick report, including those statements of material fact set forth in Paragraph 38 of this Complaint.

45. At all times material hereto, BSB exercised due care in connection with its purchase of the Penn Square CD. BSB first discovered the false and misleading character of the statements, as well as the omissions, described in Paragraphs 38, 39 and 40 only after the OCC had closed Penn Square on July 5, 1982.

46. In connection with the fraudulent activities, material misrepresentations and material omissions heretofore alleged, defendants Peat Marwick, Blanton and York used, or caused to be used, the mails and/or means or instrumentalities of interstate commerce.

47. As a direct and proximate result of the fraudulent activities, material misrepresentations and material

omissions on the part of defendants Peat Marwick, Blanton and York heretofore alleged, BSB has suffered the loss of an as yet undetermined portion of its investment in the Penn Square CD, together with the interest to which it is entitled by the terms of that instrument.

B. *SECOND COUNT* (Against Peat Marwick, Blanton and York—Section 17(a))

48. This Second Count is brought against the defendants Peat Marwick, Blanton and York under Section 17(a) of the Securities Act, to enforce rights belonging to BSB by reason of material misrepresentations and omissions made in connection with the purchase by BSB of the Penn Square CD.

49. Plaintiff repeats and incorporates herein by reference the allegations contained in Paragraphs 1-29 and 32-41 of this Complaint.

50. Defendants Peat Marwick, Blanton and York knew or should have known that the statements of material fact set forth in Paragraph 38 of this Complaint were untrue, as described in Paragraph 39, and that the Peat Marwick report should have stated the material facts set forth in Paragraph 39(a)(1)-(6) of this Complaint in order to make the statements that were made in that report not misleading.

51. Plaintiff repeats and incorporates herein by reference the allegations contained in Paragraphs 43-47 of this Complaint.

C. *THIRD COUNT* (Against Peat Marwick, Blanton and York—Fraudulent Misrepresentation)

52. This Third Count is brought against the defendants, Peat Marwick, Blanton and York, under the principles of pendent jurisdiction, and by reason of diversity

of citizenship, to enforce rights arising under state law by reason of fraudulent misrepresentations and omissions.

53. Plaintiff repeats and incorporates herein by reference the allegations contained in Paragraphs 1 through 29 and 35 through 45 of this Complaint.

54. As a direct and proximate result of the fraudulent misrepresentations and omissions on the part of defendants Peat Marwick, Blanton and York alleged herein, on which BSB justifiably relied, BSB has suffered the loss of an as yet undetermined portion of its investment in the Penn Square CD, together with the interest to which it is entitled by the terms of that instrument.

D. *FOURTH COUNT* (Against Peat Marwick, Blanton and York—Negligent Misrepresentation)

55. This Fourth Count is brought against the defendants, Peat Marwick, Blanton and York, under the principles of pendent jurisdiction, and by reason of diversity of citizenship, to enforce rights arising under state law by reason of negligent misrepresentations and omissions.

56. Plaintiff repeats and incorporates herein by reference the allegations contained in Paragraphs 1 through 29 of this Complaint, as well as the allegations contained in Paragraphs 35 through 41 of the Complaint relating to the misrepresentations and omissions of defendants Peat Marwick, Blanton and York.

57. During defendant Peat Marwick's engagement by Penn Square and at the time Peat Marwick rendered its March 19, 1982 audit report, defendants Peat Marwick, Blanton and York knew that Penn Square had sold certificates of deposit in the past and was likely to continue to sell certificates of deposit in the future, and knew or should have known that purchasers, including BSB, of

large, mostly uninsured certificates of deposit would or were likely to rely on the statements and information regarding the condition of Penn Square contained in the Peat Marwick report and Penn Square financials when making their purchases.

58. Defendants Peat Marwick, Blanton and York each owed a duty to BSB to exercise professional care and skill in conducting the audit of the 1981 Penn Square financials and to exercise professional care and skill in rendering an opinion in connection with that audit.

59. Defendants Peat Marwick, Blanton and York breached their duties to BSB by negligently expressing an unqualified opinion in the Peat Marwick report and by negligently making the false and misleading representations of material fact alleged herein.

60. BSB purchased the Penn Square CD in justifiable reliance on the accuracy and completeness of the representations made by defendants Peat Marwick, Blanton and York in the Peat Marwick report, including those false and misleading statements of material fact alleged herein.

61. As a direct and proximate result of the negligence of defendants Peat Marwick, Blanton and York, BSB has suffered the loss of an as yet undetermined portion of its investment in the Penn Square CD, together with the interest to which it is entitled by the terms of that instrument.

E. *FIFTH COUNT* (Against First United—Section 10 (b) and Rule 10b-5)

62. This Fifth Count is brought against the defendant First United under Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder, to enforce rights belonging to BSB by reason of material misrepresentations and omissions made in connection with the purchase by BSB of the Penn Square CD.

63. Plaintiff repeats and incorporates herein by reference the allegations contained in Paragraphs 1 through 29 and 32 through 34 of this Complaint.

64. On or about April 28, 1982, defendant First United, through its broker-employee Tom Schofield, telephoned an officer of BSB (hereinafter the "April 28 telephone conversation") in an effort to solicit BSB's interest in purchasing a certificate of deposit from Penn Square.

65. Prior to the April 28 telephone conversation, defendant First United had assured BSB that First United investigated the condition of each of its bank clients before brokering certificates of deposit issued by that bank. During the April 28 telephone conversation, defendant First United told BSB that Penn Square was offering an interest rate of 16% on one million dollar certificates of deposit, that BSB had to decide quickly to take advantage of the offer, that First United had brokered Penn Square certificates of deposit in the past, and that Penn Square was "one of First United's banks." By its statements and representations in the course of the April 28 telephone conversation First United led BSB reasonably to believe that Penn Square was a regular client of First United.

66. During this April 28 telephone conversation defendant First United, in order to induce BSB to purchase a certificate of deposit from Penn Square, also made oral representations to BSB concerning the following facts, among others:

(a) The earnings of Penn Square as of December 31, 1980 and December 31, 1981.

(b) The capital position of Penn Square as of December 31, 1980 and December 31, 1981.

(c) The growth of Penn Square deposits as of December 31, 1980 and December 31, 1981.

67. In order to induce BSB to purchase a certificate of deposit from Penn Square, from which transaction First United earned a substantial commission, defendant First United made representations of material fact, including, among others, the statements set forth in Paragraphs 65 and 66 hereof, which were intended to and did lead BSB reasonably to believe that First United had conducted a thorough investigation of, and was knowledgeable about and familiar with, the condition of Penn Square and the risks involved in purchasing a certificate of deposit from Penn Square and to believe that the purchase of a one million dollar certificate of deposit was a sound investment for BSB.

68. BSB is informed and believes and therefore avers that the representations described in Paragraph 67 of this Complaint constituted untrue statements of material fact, which the defendant First United knew were untrue or was reckless in not so knowing or made without a genuine belief in the truth thereof, and which operated as a fraud and deceit on the plaintiff, in that:

(a) First United had not conducted a thorough investigation of, nor was it knowledgeable about or familiar with, the condition of Penn Square or the risks involved in purchasing a certificate of deposit from Penn Square.

(b) First United did not have a reasonable basis, nor adequate factual support, for its representation that the Penn Square CD was a sound investment for BSB.

(c) The Penn Square CD was not a sound investment for BSB.

69. If defendant First United had conducted a thorough investigation of Penn Square and of the risks involved in purchasing a certificate of deposit from Penn Square prior to the April 28, 1982 telephone conversation

(as it represented it had done). First United would have known the following material facts, among others, which were necessary to be stated in order to make the statements made to BSB by First United, in the light of the circumstances under which they were made, not misleading:

(a) That Arthur, Young & Company ("Arthur Young"), which had examined the consolidated financial statements of First Penn and Penn Square and parent-only financial statements of First Penn as of December 31, 1980, had issued a *qualified* opinion dated March 13, 1981 because Arthur Young was unable to satisfy itself that the reserve for possible loan losses at December 31, 1980 was adequate due to the lack of supporting documentation of collateral values of certain loans.

(b) That the OCC, in connection with three separate examinations of Penn Square, had given the bank a rating of "3" on the Uniform Financial Institution's Rating System and had reported serious deficiencies in the bank.

(c) That the OCC had entered into an Administrative Agreement with Penn Square with which Penn Square and the Penn Square Board of Directors had failed to comply.

(d) That an unreasonably large proportion of Penn Square's loan portfolio consisted of loans to entities involved in energy-related enterprises.

(e) That a substantial proportion of the loans made by Penn Square were supported by insufficient and inadequate collateral.

(f) That the Penn Square loan portfolio contained an unreasonably large volume of past due loans and loans which were not accruing interest.

(g) That the volume of loan charge-offs was unreasonably high and had increased markedly between 1980 and 1981.

(h) That the volume of overdrafts was unreasonably high.

(i) That Penn Square's internal audit and administrative controls were inadequate to perform their respective functions and to assure the adherence to and proper implementation of prescribed rules and policies.

(j) That the quantity of loan participations sold by Penn Square was unreasonably high and that Penn Square had made and was continuing to make periodic payments of interest and/or principal to its correspondent or co-participating banks on some of the loans in which it had sold participations, without first having received payments from the borrowers.

70. Prior to its purchase of the Penn Square CD, BSB did not know the material facts about Penn Square set forth in Paragraph 69 of this Complaint, and if BSB had known these material facts, it would not have purchased the Penn Square CD.

71. Defendant First United made the false and misleading representations of material fact alleged herein intending that BSB rely thereon and for the purpose of inducing BSB to purchase a certificate of deposit from Penn Square.

72. BSB purchased the Penn Square CD in justifiable reliance on the false and misleading statements made by defendant First United that are described in Paragraphs 64 through 69 of this Complaint.

73. At all times material hereto, BSB exercised due care in connection with its purchase of the Penn Square CD. BSB first discovered the false and misleading char-

acter of the statements described above only after the OCC had closed Penn Square on July 5, 1982.

74. In connection with the fraudulent activities, misrepresentations and omissions heretofore alleged, defendant First United used, or caused to be used, the mails and/or means or instrumentalities of interstate commerce.

75. As a direct and proximate result of defendant First United's fraudulent activities, material misrepresentations and material omissions heretofore alleged, BSB has suffered the loss of an as yet undetermined portion of its investment in the Penn Square CD, together with the interest to which it is entitled by the terms of that instrument.

F. *SIXTH COUNT* (Against First United—Section 17(a))

76. This Sixth Count is brought against the defendant First United under Section 17(a) of the Securities Act to enforce rights belonging to BSB by reason of material misrepresentations and omissions made in connection with the purchase by BSB of the Penn Square CD.

77. Plaintiff repeats and incorporates herein by reference the allegations contained in Paragraphs 1-29, 32-34, and 64-67 of this Complaint.

78. BSB is informed and believes and therefore avers that the representations described in Paragraph 67 of this Complaint constituted untrue statements of material fact, which the defendant First United knew or should have known were untrue, and operated as a fraud and deceit on the plaintiff, in that:

(a) First United had not conducted a thorough investigation of, nor was it knowledgeable about or familiar with, the condition of Penn Square or the risks involved in purchasing a certificate of deposit from Penn Square.

(b) First United did not have a reasonable basis, nor adequate factual support, for its representation that the Penn Square CD was a sound investment for BSB.

(c) The Penn Square CD was not a sound investment for BSB.

79. Plaintiff repeats and incorporates herein by reference the allegations contained in Paragraphs 69-75 of this Complaint.

G. *SEVENTH COUNT* (Against First United—Section 12(2))

80. This Seventh Count is brought against the defendant First United under Section 12(2) of the Securities Act to enforce rights belonging to BSB by reason of material misrepresentations and omissions made in connection with the sale of securities by First United.

81. Plaintiff repeats and incorporates herein by reference the allegations contained in Paragraphs 1 through 29 and 32 through 34 of this Complaint.

82. Plaintiff repeats and incorporates herein by reference the allegations contained in Paragraphs 64 through 75 of this Complaint relative to the material misrepresentations and omissions of defendant First United and the discovery thereof by BSB; relative to BSB's reliance thereon in purchasing the Penn Square CD and BSB's resulting loss; and relative to the use of the mails and/or means or instrumentalities of interstate commerce by First United.

83. BSB has previously tendered, and hereby continually tenders, to Penn Square, and to the FDIC in its capacity as receiver of Penn Square, the Penn Square CD in exchange for all consideration received by Penn Square from BSB.

84. This action is brought by the plaintiff within one year after the discovery by the plaintiff of the material misrepresentations and omissions alleged herein, within three years of the sale of the Penn Square CD, and otherwise within the time prescribed by law.

H. *EIGHTH COUNT* (Against First United—M.G.L. c. 110A)

85. This Eighth Count is brought against the defendant First United under the Principles of pendent jurisdiction, and by reason of diversity of citizenship, to enforce rights arising under M.G.L. c.110A, sections 101, 410(a)(2) and 410(b) by reason of material misrepresentations and omissions made in connection with the sale of the Penn Square CD to BSB.

86. Plaintiff repeats and incorporates herein by reference the allegations contained in Paragraphs 1 through 29 and 32 through 33 of this Complaint.

87. The Penn Square CD constitutes a security within the meaning of M.G.L. c. 110A § 401(k).

88. Plaintiff repeats and incorporates herein by reference the allegations contained in Paragraphs 64 through 73 and 75 of this Complaint.

89. BSB has previously tendered, and hereby continually tenders, to Penn Square, and to the FDIC in its capacity as receiver of Penn Square, the Penn Square CD in exchange for all consideration received by Penn Square from BSB.

90. This action is brought by the plaintiff within two years after the contract of sale, as required by M.G.L. c. 110A, § 410(e), and otherwise within the time prescribed by law.

I. *NINTH COUNT* (Against First United—Oklahoma Securities Act)

91. This Ninth Count is brought against the defendant First United under the principles of pendent jurisdiction, and by reason of diversity of citizenship, to enforce rights arising under the Oklahoma Securities Act, 71 Okl. Stat. §§ 101, 408(a)(2)(i) and 408(b) by reason of material misrepresentations and omissions made in connection with the sale of the Penn Square CD to BSB.

92. Plaintiff repeats and incorporates herein by reference the allegations contained in Paragraphs 1 through 29 and 32 through 33 of the Complaint.

93. The Penn Square CD constitutes a security within the meaning of 71 Okl. Stat. § 2(20).

94. Plaintiff repeats and incorporates herein by reference the allegations contained in Paragraphs 64 through 73 and 75 of this Complaint.

95. BSB has previously tendered, and hereby continually tenders, to Penn Square, and to the FDIC in its capacity as receiver of Penn Square, the Penn Square CD in exchange for all consideration received by Penn Square from BSB.

96. This action is brought by the plaintiff within two years after the discovery by the plaintiff of the material misrepresentations and omissions alleged herein, as required by 71 Okl. Stat. § 408(e), and otherwise within the time prescribed by law.

J. *TENTH COUNT* (Against First United—Fraudulent Misrepresentation)

97. This Tenth Count is brought against the defendant First United under the principles of pendent jurisdiction, and by reason of diversity of citizenship, to enforce rights arising under state law by reason of fraudulent misrepresentations and omissions.

98. Plaintiff repeats and incorporates herein by reference the allegations contained in Paragraphs 1 through 29 and 64 through 73 of this Complaint.

99. Defendant First United made the false and misleading representations of material fact alleged herein intending that BSB rely thereon and for the purpose of inducing BSB to purchase a certificate of deposit from Penn Square.

100. As a direct and proximate result of the fraudulent misrepresentations and omissions on the part of defendant First United alleged herein, on which BSB justifiably relied, BSB has suffered the loss of an as yet undetermined portion of its investment in the Penn Square CD, together with the interest to which it is entitled by the terms of that instrument.

K. *ELEVENTH COUNT* (Against First United—Negligent Misrepresentation)

101. This Eleventh Count is brought against the defendant First United under the principles of pendent jurisdiction, and by reason of diversity of citizenship, to enforce rights arising under state law by reason of negligent misrepresentations and omissions.

102. Plaintiff repeats and incorporates by reference the allegations contained in Paragraphs 1 through 29 of this Complaint.

103. Plaintiff repeats and incorporates herein by reference the allegations contained in Paragraphs 64 through 70 of this Complaint relative to the material misrepresentations and omissions made by defendant First United.

104. Defendant First United made the false and misleading representations of material fact alleged herein intending that BSB would rely thereon and for the purpose of inducing BSB to purchase a certificate of deposit from Penn Square.

105. Defendant First United owed BSB duties to use reasonable care and skill in ascertaining the truthfulness and accuracy of the representations that it made and in communicating only truthful and accurate information which was not misleading.

106. Defendant First United breached the duties that it owed to BSB by negligently making the false and misleading respresentations of material fact alleged herein.

107. BSB purchased the Penn Square CD in justifiable reliance on defendant First United's false and misleading representations.

108. As a direct and proximate result of defendant First United's negligence, BSB has suffered the loss of an as yet undetermined portion of its investment in the Penn Square CD, together with the interest to which it is entitled by the terms of that instrument.

L. *TWELFTH COUNT* (Against First United—M.G.L. c.93A)

109. This Twelfth Count is brought against the defendant First United under the principles of pendent jurisdiction, and by reason of diversity of citizenship, to enforce rights arising under M.G.L. c.93A, sections 2 and 11 by reason of unfair or deceptive acts or practices engaged in by First United.

110. Plaintiff repeats and incorporates by reference herein the allegations contained in Paragraphs 1 through 29, 64 through 72, 78 and 104 through 107 of this Complaint.

111. Plaintiff BSB and defendant First United are engaged in trade or commerce within the meaning of M.G.L. c.93A, § 11.

112. By the acts and conduct alleged herein, First United has knowingly and wilfully engaged in unfair or deceptive acts or practices in violation of M.G.L. c.93A,

§§ 2 and 11, and regulations promulgated thereunder by the Attorney General of Massachusetts.

113. As a direct and proximate result of defendant First United's unlawful conduct, BSB has suffered loss of money and property, namely, an as yet undetermined portion of its investment in the Penn Square CD, together with the interest to which it is entitled by the terms of that instrument.

WHEREFORE, Plaintiff Brockton Savings Bank prays:

1. That judgment be entered against defendants Peat Marwick, Blanton and York, jointly and severally, under each of the First, Second, Third and Fourth Counts for the full amount of the damages sustained by the plaintiff, with interest thereon.

2. That judgment be entered against defendant First United under each of the Fifth, Sixth, Tenth, and Eleventh Counts for the full amount of the damages sustained by the plaintiff, with interest thereon.

3. That judgment be entered against defendant First United under the Seventh Count for one million dollars ($1,000,000) plus interest thereon or, alternatively, that the plaintiff be awarded the full amount of the damages it has sustained under said Count, with interest thereon.

4. That judgment be entered against defendant First United under the Eighth and Ninth Counts for one million dollars ($1,000,000) plus interest thereon and a reasonable attorneys' fee, or, alternatively, that the plaintiff be awarded the full amount of the damages it has sustained under said Counts, with interest thereon and a reasonable attorney's fee.

5. That judgment be entered against defendant First United for such damages as the plaintiff has sustained under the Twelfth Count with interest thereon and a reasonable attorneys' fee and that plaintiff be awarded treble said damages or, alternatively, double said damages, as provided in M.G.L. c. 93A, § 11.

6. That plaintiff be awarded its costs of this action and a reasonable attorneys' fee.

7. That plaintiff be awarded such other and further relief as the Court may deem just and proper.

PLAINTIFF DEMANDS TRIAL BY JURY ON ALL CLAIMS.

By its Attorneys,
HILL & BARLOW

By /s/ Michael S. Greco
MICHAEL S. GRECO

By /s/ Robert G. Bone
ROBERT G. BONE

By /s/ Jeanne M. Kempthorne
JEANNE M. KEMPTHORNE

225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6200

DATED: February 24, 1983

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BROCKTON SAVINGS BANK,
Plaintiff

v.

PEAT, MARWICK, MITCHELL & Co. a Partnership;
JAMES BLANTON; C. DEAN YORK;
FIRST UNITED FUND, LTD.,
Defendants.

PLAINTIFF'S FIRST SET OF INTERROGATORIES PROPOUNDED TO DEFENDANT FIRST UNITED FUND, LTD.

The plaintiff, Brockton Savings Bank, ("BSB"), propounds the following interrogatories to the defendant, First United Fund, Ltd., pursuant to Rule 33 of the Federal Rules of Civil Procedure.

I. INSTRUCTIONS

A. Please take notice that Rule 33 of the Federal Rules of Civil Procedure requires that you respond to each of the interrogatories set forth below separately and fully in writing under oath, unless you object, in which event you must state the reasons for your objection. The Rule further requires that you sign your answers to these interrogatories and that you or your attorney sign any objections which you make to them. The Rule also requires that you serve a copy of your answers and any objections within forty-five (45) days after the service of the summons and Complaint upon you and forthwith file the original of your answers and objections, if any, with the Court.

B. In addition, please take notice that Rule 26(e) of the Federal Rules of Civil Procedure requires you to

supplement your responses to these interrogatories to include information acquired by you after the date of your initial response if, first, such information concerns any question directly addressed to the identity and location of persons having knowledge of discoverable matters or, second, if such information provides the basis upon which you know that (a) your response was incorrect when made or (b) your response, though correct when made, is no longer correct and the circumstances are such that your failure to amend the response would constitute in substance a knowing concealment.

C. When a document that these interrogatories request you to identify is no longer in your possession, state what disposition was made of the document and when and by whom.

D. For each interrogatory answered, (1) identify each person who participated in the preparation of the answer and, when the answer is based on other than the personal knowledge of the person so identified, identify the sources of the information provided in the answer; and (2) unless otherwise identified, identify each document used in preparing the answer to such interrogatory.

E. If you are unable to answer any interrogatory completely, you should answer to the extent possible, stating specifically the reason you are unable to answer the remaining portion of the interrogatory, and stating whatever information or knowledge you have concerning the remaining portion.

F. If you object to any interrogatory on the basis of privilege, you should specify the rule of privilege upon which you base your objection, the factual basis for its assertion, and the identity of any documents included within your objection.

G. The relevant time period covered by these interrogatories, unless otherwise specified, is January 1, 1978 to date.

H. Whenever the pronoun "he" or a derivative thereof is used in any interrogatory, it refers to the female as well as male gender, and includes the plural as well as the singular.

II. DEFINITIONS

Except as otherwise expressly indicated, the following terms have the meanings assigned to them below:

A. The term "First United" refers to defendant First United Fund, Ltd., and any of its subsidiaries, officers, directors, agents, employees, representatives, consultants and legal counsel acting for First United Fund, Ltd. with respect to the transactions or events covered by the interrogatory.

B. The term "Schofield" refers to Thomas Schofield.

C. The term "BSB" refers to plaintiff Brockton Savings Bank, and any of its officers, directors, agents, employees, representatives, consultants and legal counsel acting for Brockton Savings Bank with respect to the transactions or events covered by the interrogatory.

D. The term "Peat Marwick" means the defendant Peat, Marwick, Mitchell & Co., its partners, agents, employees, representatives, consultants and legal counsel, as of the date hereof or during the period that Peat Marwick was engaged in the Penn Square audit.

E. The term "Penn Square" means any one or more of First Penn Corporation, Penn Square Bank, N.A., and their subsidiaries, and the officers, directors, stockholders, agents, employees, representatives, consultants and legal counsel of First Penn Corporation, Penn Square Bank, N.A., and such subsidiaries, as the context warrants.

F. The term "Penn Square audit report" refers to all representations made or prepared by Peat Marwick with respect to Penn Square's 1981 financial statements, including its opinion as to whether such statements were presented in accordance with generally accepted accounting principles applied on a consistent basis.

G. The term "CD" refers to bank certificates of deposit brokered by First United, without regard to the issuer of such certificates.

H. The term "BSB CD" refers to the $1,000,000 CD issued by Penn Square which BSB purchased on April 28, 1982.

I. The term "OCC" refers to the Office of the Comptroller of the Currency.

J. The term "person" includes natural persons, partnerships, corporations and other business entities.

K. The term "you" or "your" refers to the defendant First United or other persons having knowledge of the answers requested, as well as the persons answering these interrogatories on behalf of defendant First United.

L. The term "document" includes, without limitation, the original and all non-identical copies of any working paper, report, memorandum, letter, statement, handwritten note, notebook, brochure, minutes of meetings, summary, tabulation, study, analysis, audit, accounting record, invoice, bill, check, draft, receipt, diary, drawing, graph, chart, photograph, illustration, telegram, phonorecord, tape recording, computer tape, computer program, computer output in printed form, data sheet, or any other physical object containing written or printed material or a physical image

or sound from which information can be obtained.

M. The term "identify" or "identity", when referring to an *individual person*, means to state the person's name; address at the time of the event or transaction referred to; present or last known address; present or last known telephone number; name and address of present employer, position, job title or responsibilities; name and address of employer, and position, job title and responsibilities at the time of the event or transaction referred to; and relationship to the defendant First United.

N. The term "identify" or "identity", when used in reference to a *company* or *business*, means to state the company's full name, present address, state and date of incorporation if applicable, and principal place of business and to describe the major business of the company.

O. The term "identify" or "identity", when used in reference to an *oral communication* (including without limitation, telephone conversations), means to state the nature of the communication, the date it took place, the "identities" of the participants and all other persons present, the place where the communication took place or the location of each participant, and the substance of the communication, indicating, as fully as you are able, what was said by each of the participants.

P. The term "identify" or "identity", when used in reference to a *document*, means to state: (1) the nature of the document (e.g., letter, report, memorandum, chart, etc.); (2) the date of the document, or, if undated, the dates upon which the document was sent and received; (3) any identifying number or code appearing on the docu-

ment; (4) the identity of the person who wrote, signed, dictated or otherwise participated in the document's preparation; (5) the identity of each person who received or is indicated on the document as having received a copy of the document; (6) a description of the contents of the document; (7) the document's present location; and (8) the identity of each person having possession, custody or control, whether actual or constructive, of the document. With respect to any interrogatory calling for an identification or listing of any document, a copy of the document may be attached in lieu thereof, provided that the document attached provides all the information requested and that the document is specifically identified in your response to the interrogatory.

Q. The term "describe" when used in reference to an *event, action* or *conduct* or *series of events* or *actions* means to state the nature of the event, action or conduct, the date on which or period of time within which it took place, the identities of the participants and all other persons present, the place or places at which each participant was located during the described activity and the specific doings and statements of each participant which comprise the event, conduct or action.

R. The term "describe" when used in reference to *policies, standards, procedures* or *practices* means (1) to state fully the nature and substance of such policies, standards, procedures or practices; (2) to identify all documents in which such policies, standards, procedures or practices are described; and (3) to state the statutory, regulatory or other authority pertaining to such policies, standards, procedures or practices.

III. INTERROGATORIES

1. Identify each person who gathered or furnished information for, or assisted in the preparation of, or signed, the answers to these interrogatories and for each such person:

(a) describe his role; and

(b) state the interrogatories for which he supplied information or with which he was otherwise involved.

2. Identify First United.

3. Identify Schofield.

4. Identify the officers of First United.

5. Identify the directors of First United.

6. Describe all First United policies, standards, practices and procedures related to First United's determination whether to broker an issuer's CDs or other investment or commercial paper.

7. Did First United deviate in any way from the policies, standards, practices and procedures described in Interrogatory 6 in determining whether to broker CDs or other commercial or investment paper issued by Penn Square? If so, describe in detail the manner in which the policies, standards, procedures and practices employed in such determination deviated from those described in Interrogatory 6.

8. Describe all the ways in which First United's policies, standards, practices and procedures related to its determination whether to broker an issuer's CDs or other investment or commercial paper depend on whether or not the face amount of such paper is insured.

9. Identify all documents prepared by or distributed by First United relating or pertaining to its solicitation

of prospective purchasers and sellers (including, without limitation, issuers) of and the marketing of CDs or other investment or commercial paper.

10. Identify all banks for which First United provides or has provided brokerage services with respect to the sale or offer for sale of CDs or other investment or commercial paper; and state, with respect to each bank, the date on which First United first provided such services.

11. State the date on which First United first provided brokerage services to any banking institution.

12. What is the average commission or other fee, expressed both as a percentage of face amount and also expressed in dollar amount, received during calendar years 1981 and 1982 by First United for its services in brokering:

a) CDs of face amount less than $100,000?

b) CDs of face amount equal to or greater than $1,000,000?

13. Identify each person, affiliated in any capacity with First United, who initially contacted or was contacted by Penn Square for the purpose of brokering CDs or other commercial or investment paper; identify all documents and oral communications which constitute, concern, refer to or relate to such initial contact; and state the date on which such contact with Penn Square was made.

14. Describe all business transactions, including without limitation, banking and brokerage services, and all business, social and familial relationships or affiliations between First United and Penn Square which have occurred or existed at any time, irrespective of Instruction G.

15. Identify all documents and oral communications sent or initiated by Penn Square to First United.

16. Identify all documents and oral communications sent or initiated by First United to Penn Square.

17. Has First United ever communicated directly with Peat Marwick concerning Penn Square? If so, identify the persons who participated in such communications; state the dates on which such communications took place; and identify all documents and oral communications which constitute, concern, refer to or relate to such communications.

18. Identify all documents and oral communications, regardless of source, concerning Penn Square which First United received prior to April 28, 1982; identify the sources of such information; state the dates on which such information was received; and describe all documents and oral communications which contain or pertain to such information.

19. Identify all documents and oral communications, regardless of source, concerning Penn Square which First United received on or after April 28, 1982; identify the sources of such information; state the dates on which such information was received; and describe all documents and oral communications which contain or pertain to such information. Did First United communicate any of this information to any other person, and if so, identify each such person and state the date such information was communicated.

20. Identify and describe all research, tests and procedures performed by First United in determining whether to provide brokerage services to Penn Square.

21. Did First United enter into any agreements with Penn Square? If so, provide the following information:

a) Describe fully the terms and conditions of all such agreements.

b) Identify all documents which embody the terms and conditions of such agreements.

22. Describe all commission and other fee arrangements that existed between First United and Penn Square.

23. Describe, as a percentage of face amount and in total dollar amount, the commission or other fee arrangement Penn Square agreed to pay First United for brokering the BSB CD.

24. Identify each person affiliated with First United who was responsible for managing or supervising the brokerage of CDs or other investment or commercial paper issued by Penn Square.

25. Did First United know or have information, prior to April 28, 1982, that the OCC was or had been engaged in an investigation of Penn Square? If so, state the date on which First United first acquired such knowledge or information, identify each source of such knowledge or information, and identify each person to whom First United communicated any such knowledge or information and state the date that such communication was made.

26. Did First United know or have information, on or after April 28, 1982, that the OCC was or had been engaged in an investigation of Penn Square? If so, state the date on which First United first acquired such knowledge or information, identify each source of such knowledge or information, and identify each person to whom First United communicated any such knowledge or information and state the date that such communication was made.

27. Did First United know or have information, prior to April 28, 1982, that Penn Square was or had engaged in activities or practices that constituted violations of state and/or federal law? If so, describe in detail the nature of all such activities and practices; state with respect to each the date on which First United knew or obtained information concerning such activity or practice;

identify the source of such knowledge or information, and identify each person to whom First United communicated any of such knowledge or information and state the date such communication was made.

28. Did First United know or have information, on or after April 28, 1982, that Penn Square was or had engaged in activities or practices that constituted violations of state and/or federal law? If so, describe in detail the nature of all such activities and practices; state with respect to each the date on which First United knew or obtained information concerning such activity or practice; identify the source of such knowledge or information, and identify each person to whom First United communicated any of such knowledge or information and state the date such communication was made.

29. Describe Penn Square's reputation in the banking and financial communities on or about April 28, 1982 to the extent that First United was familiar with such reputation.

30. Describe Penn Square's reputation in the banking and financial communities after April 28, 1982 and up to July 5, 1982, to the extent that First United was familiar with such reputation.

31. State the date on which First United first learned that Arthur Young and Company had rendered a qualified opinion with respect to Penn Square's 1980 financial statements.

32. Did First United ever receive a copy of the Arthur Young and Company audit report of Penn Square's 1980 financial statements? If so, state the date on which such report was received; identify each person who sent such report to First United, and identify each person to whom First United sent a copy of all or any portion of such report and state the date on which the report was sent to each such person.

33. State the date on which First United first learned of the contents of Peat Marwick's audit report, including its unqualified opinion of Penn Square's 1981 financial statements.

34. Did First United ever receive a copy of the Peat Marwick audit report, including its unqualified opinion of Penn Square's 1981 financial statement? If so, state the date on which such report was received; identify each person who sent such report to First United, identify each person to whom First United sent a copy of all or any portion of such report and state the date on which the report was sent to each such person.

35. Has First United ever communicated directly with defendant Peat Marwick? If so, identify the persons who participated in such communications; state the dates on which such communications took place; and identify all documents and oral communications which constitute, concern, refer to or relate to all such communications.

36. Describe all insurance policies which afford First United coverage for claims of the nature made against it by the plaintiff Brockton Savings Bank; state the name of each issuer or carrier of such policies; and state the limits of coverage provided in each policy.

BROCKTON SAVINGS BANK
By its Attorneys,

/s/ Michael S. Greco
MICHAEL S. GRECO

/s/ Robert G. Bone
ROBERT G. BONE

/s/ Jeanne M. Kempthorne
JEANNE M. KEMPTHORNE

HILL & BARLOW
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6200

Dated: February 24, 1983

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BROCKTON SAVINGS BANK,
Plaintiff
v.
PEAT, MARWICK, MITCHELL & CO., a Partnership;
JAMES BLANTON; C. DEAN YORK;
FIRST UNITED FUND, LTD.,
Defendants.

PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS FROM FIRST UNITED FUND, LTD.

Pursuant to Rule 34, Federal Rules of Civil Procedure, the plaintiff, Brockton Savings Bank, requests that the defendant, First United Fund, Ltd., produce for inspection and copying the documents hereinafter named. Production shall take place at at [sic] the offices of Hill & Barlow, 225 Franklin Street, Boston, Massachusetts forty-five days after service of the Summons and Complaint.

Definitions and Instructions

Except as otherwise expressly indicated, the following terms have the meanings assigned to them below:

A. The term "First United" refers to defendant First United Fund, Ltd., and any of its subsidiaries, officers, directors, agents, employees, representatives, consultants and legal counsel acting for First United Fund, Ltd. with respect to the transactions or events covered by the interrogatory.

B. The term "BSB" refers to plaintiff Brockton Savings Bank, and any of its officers, directors, agents, em-

ployees, representatives, consultants and legal counsel acting for Brockton Savings Bank with respect to the transactions or events covered by the interrogatory.

C. The term "Peat Marwick" means the defendant Peat, Marwick, Mitchell & Co., its partners, agents, employees, representatives, consultants and legal counsel, both as of the date hereof and during the period that Peat Marwick was engaged in the Penn Square audit.

D. The term "Penn Square" means any one or more of First Penn Corporation, Penn Square Bank, N.A., and their subsidiaries, and the officers, directors, stockholders, agents, employees, representatives, consultants and legal counsel of First Penn Corporation, Penn Square Bank, N.A., and such subsidiaries, as the context warrants.

E. The term "Penn Square audit report" refers to all representations made or prepared by Peat Marwick with respect to Penn Square's 1981 financial statements, including its opinion as to whether such statements were presented in accordance with generally accepted accounting principles applied on a consistent basis.

F. The term "CD" refers to bank certificates of deposit brokered by First United, without regard to the issuer of such certificates.

G. The term "BSB CD" refers to the $1,000,000 CD issued by Penn Square which BSB purchased on April 28, 1982.

H. The term "OCC" refers to the Office of the Comptroller of the Currency.

I. The term "person" includes natural persons, partnerships, corporations and other business entities.

J. The term "you" or "your" refers to the defendant First United or other persons having knowledge of the answers requested, as well as the persons answering these interrogatories on behalf of defendant First United.

K. The term "document" includes, without limitation, the original and all non-identical copies of any working paper, report, memorandum, letter, statement, handwritten notebook, brochure, minutes of meetings, summary, compilation, study, analysis, audit, accounting record, invoice, bill, check, draft, receipt, diary, drawing, graph, chart, photograph, illustration, telegram, phonorecord, tape recording, computer tape, computer program, computer output in printed form, data sheet, or any other physical object containing written or printed material or a physical image or sound from which information can be obtained.

L. The term "identify" or "identity", when referring to an *individual person*, means to state the person's name; address at the time of the event or transaction referred to; present or last known address; present or last known telephone number; name and address of present employer, position, job title or responsibilities; name and address of employer, and position, job title and responsibilities at the time of the event or transaction referred to; and relationship to the defendant First United.

M. The term "identify" or "identity", when used in reference to a *company* or *business*, means to state the company's full name, present address, state and date of incorporation if applicable, and principal place of business and to describe the major business of the company.

N. For purposes of the definition of "document" stated hereinabove, any document requested below which contains handwritten comments or annotations is a separate document, and defendants are requested to produce both (a) the original document and (b) all copies which contain comments or annotations.

O. If any document is not produced because of a claim of privilege, identify such document by providing the following information in your Rule 34 response: (1) identify the author or preparer, and if applicable, sender

of the document; (2) identify the recipient of the document; (3) identify each person who received a copy of the document; (4) state the date on which the document was prepared or received; (5) describe the type of document (e.g. memorandum, letter, report); (6) state the nature of the privilege claimed; and (7) state whether the privileged matter can be excised so as to render the remainder of the document producible, and whether the matter claimed to be privileged will be excised and the remainder of the document produced. You are requested to produce documents from which material you consider privileged is excisable.

P. The relevant time period covered by these requests, unless otherwise specified, is January 1, 1978 to date.

Q. Defendants are requested to produce all documents in their or their employees' and representatives' possession, custody or control. If certain requested documents are not in defendants' possession, and no production is made for that reason, please indicate in your Rule 34 response in whose possession, custody or control such documents may be found, and provide the information, as applicable, requested in paragraph "O" above.

Documents Requested

1. All documents which constitute, contain, refer to, or relate to the policies, standards, procedures or practices with which First United complies or attempts to comply with respect to First United's determination whether to broker an issuer's CDs or other investment or commercial paper.

2. All documents prepared by or distributed by First United relating or pertaining to its solicitation of prospective purchasers and sellers (including, without limitation, issuers) of and the marketing of CDs or other investment or commercial paper.

3. All documents, including without limitation, letters, audited financial statements, and annual reports, sent by Penn Square to First United.

4. All documents sent by First United to Penn Square.

5. All documents, regardless of source, which concern, refer to or relate to Penn Square which First United received prior to April 28, 1982.

6. All documents, regardless of source, which concern, refer to or relate to Penn Square which First United received on or after April 28, 1982.

7. All documents which constitute, contain, relate to or refer to research, tests and procedures performed by First United in determining whether to provide brokerage services to Penn Square.

8. All documents which constitute, contain, relate to or refer to the terms and conditions of all agreements between First United and Penn Square.

9. All documents, of which First United had knowledge or possession prior to April 28, 1982, and which constitute, contain, relate to or refer to examinations and investigations of Penn Square by the OCC.

10. All documents, of which First United had knowledge or possession on or after April 28, 1982, and which constitute, contain, relate to or refer to examinations and investigations of Penn Square by the OCC.

11. All documents, of which First United had knowledge or possession prior to April 28, 1982, and which constitute, contain, refer to or relate to activities and practices engaged in by Penn Square that constitute violations of state and/or federal law.

12. All documents, of which First United had knowledge or possession on or after April 28, 1982, and which constitute, contain, refer to or relate to activities and

practices engaged in by Penn Square that constitute violations of state and/or federal law.

13. All documents, of which First United had knowledge or possession prior to April 28, 1982, which were prepared by Peat Marwick and which concern, refer to or relate to Penn Square.

14. All documents, of which First United had knowledge or possession on or after April 28, 1982, which were prepared by Peat Marwick and which concern, refer to or relate to Penn Square.

15. All documents, of which First United had knowledge or possession prior to April 28, 1982, which were prepared by Arthur Young and Company and which concern, refer to or relate to Penn Square.

16. All documents, of which First United had knowledge or possession on or after April 28, 1982, which were prepared by Arthur Young and Company and which concern, refer to or relate to Penn Square.

17. All documents which constitute, concern, refer to or relate to all communications between First United and defendant Peat Marwick.

18. All insurance policies which provide coverage to First United for claims of the nature made against First United by Plaintiff Brockton Savings Bank.

19. All documents identified in the answers to Plaintiff's First Set of Interrogatories Propounded to Defendant First United Fund, Ltd., other than those documents which you will produce in response to Requests 1 through 18 herein.

BROCKTON SAVINGS BANK
By its Attorneys,

/s/ Michael S. Greco
MICHAEL S. GRECO

/s/ Robert G. Bone
ROBERT G. BONE

/s/ Jeanne M. Kempthorne
JEANNE M. KEMPTHORNE

HILL & BARLOW
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6200

DATED: February 24, 1983

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-0478-N

BROCKTON SAVINGS BANK,
Plaintiff,

v.

PEAT, MARWICK, MITCHELL & CO., *et al.*,
Defendants.

ANSWER OF DEFENDANT FIRST UNITED FUND, LTD.

Defendant First United Fund, Ltd., for its Answer to the Complaint herein, states that:

1. This defendant denies the allegations of the first paragraph of the Complaint.

2. This defendant denies the allegations of the second paragraph of the Complaint.

3. This defendant denies the allegations of the third paragraph of the Complaint.

4. This defendant denies the allegations of the fourth paragraph of the Complaint.

5. This defendant denies the allegations of the fifth paragraph of the Complaint.

6. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the sixth paragraph of the Complaint and accordingly denies the same.

7. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the seventh paragraph of the Complaint and accordingly denies the same.

8. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the eighth paragraph of the Complaint and accordingly denies the same.

9. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the ninth paragraph of the Complaint and accordingly denies the same.

10. This defendant denies the allegations of the tenth paragraph of the Complaint, except admits that it is a corporation organized under the laws of the State of New York, has its principal place of business at 1001 Franklin Avenue, Garden City, New York, is registered with the Securities Exchange Commission as a broker-dealer, and is engaged in the business of quoting rates to institutional investors on certificates of deposit ("CD's").

11. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the eleventh paragraph of the Complaint and accordingly denies the same.

12. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the twelfth paragraph of the Complaint and accordingly denies the same.

13. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the thirteenth paragraph of the Complaint and accordingly denies the same.

14. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the fourteenth paragraph of the Complaint and accordingly denies the same.

15. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the fifteenth paragraph of the Complaint and accordingly denies the same.

16. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the fifteenth [sic] paragraph of the Complaint and accordingly denies the same.

17. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the seventeenth paragraph of the Complaint and accordingly denies the same.

18. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the eighteenth paragraph of the Complaint and accordingly denies the same.

19. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the nineteenth paragraph of the Complaint and accordingly denies the same.

20. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the twentieth paragraph of the Complaint and accordingly denies the same.

21. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the twenty-first paragraph of the Complaint and accordingly denies the same.

22. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the twenty-second paragraph of the Complaint and accordingly denies the same.

23. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the twenty-

third paragraph of the Complaint and accordingly denies the same.

24. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the twenty-fourth paragraph of the Complaint and accordingly denies the same.

25. This defendant admits on information and belief the allegations of the twenty-fifth paragraph of the Complaint.

26. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the twenty-sixth paragraph of the Complaint and accordingly denies the same.

27. This defendant denies the allegations of the twenty-seventh paragraph of the Complaint, except admits on information and belief that plaintiff purchased a 90-day CD from Penn Square Bank, N. A. ("Penn Square") in the amount of $1,000,000 on or about April 28, 1982.

28. This defendant admits on information and belief the allegations of the twenty-eighth paragraph of the Complaint.

29. This defendant denies the allegations of the twenty-ninth paragraph of the Complaint.

30-61. The allegations of paragraphs 30-61 of the Complaint are not directed against this answering defendant; accordingly, no answer is required.

62. This defendant denies the allegations of the sixty-second paragraph of the Complaint.

63. This defendant's responses to paragraphs 1-29 of the Complaint are contained hereinabove. This defendant lacks information sufficient to form a belief as to the allegations of the thirty-second paragraph of the Complaint and accordingly denies the same. This defendant

denies the allegations of the thirty-third and thirty-fourth paragraphs of the complaint.

64. This defendant denies the allegations of the sixty-fourth paragraph of the Complaint, except admits that on or about April 28, 1982, this defendant, by its employee, Tom Schofield, spoke with an officer of plaintiff and quoted rates on CD's offered by various institutions, including Penn Square.

65. This defendant denies the allegations of the sixty-fifth paragraph of the Complaint, except admits that this defendant, by its employee, Tom Schofield, had engaged in prior telephone conversations with an officer of plaintiff, and that during the April 28, 1982, telephone conversation, this defendant, by Schofield, quoted to plaintiff rates on $100,000 CD's offered by various institutions, including Penn Square.

66. This defendant denies the allegations of the sixty-sixth paragraph of the Complaint.

67. This defendant denies the allegations of the sixty-seventh paragraph of the Complaint.

68. This defendant denies the allegations of the sixty-eighth paragraph of the Complaint.

69. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the sixty-ninth paragraph of the Complaint and accordingly denies the same, and further specifically denies that it represented to plaintiff that it had conducted or that it had any duty to conduct an investigation of Penn Square or the risks involved in purchasing a CD from Penn Square.

70. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the seventieth paragraph of the Complaint and accordingly denies the same.

71. This defendant denies the allegations of the seventy-first paragraph of the Complaint.

72. This defendant denies the allegations of the seventy-second paragraph of the Complaint.

73. This defendant denies the allegations of the seventy-third paragraph of the Complaint.

74. This defendant denies the allegations of the seventy-fourth paragraph of the Complaint.

75. This defendant denies the allegations of the seventy-fifth paragraph of the Complaint.

76. This defendant denies the allegations of the seventy-sixth paragraph of the Complaint.

77. This defendant's responses to paragraphs 1-29, 32-34, and 64-67 of the Complaint are contained hereinabove.

78. This defendant denies the allegations of the seventy-eighth paragraph of the Complaint.

79. This defendant's responses to paragraphs 69-75 of the Complaint are contained hereinabove.

80. This defendant denies the allegations of the eightieth paragraph of the Complaint.

81. This defendant's responses to paragraphs 1-29 and 32-34 of the Complaint are contained hereinabove.

82. This defendant's responses to paragraphs 64-75 of the Complaint are contained hereinabove.

83. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the eighty-third paragraph of the Complaint and accordingly denies the same.

84. This defendant denies the allegations of the eighty-fourth paragraph of the Complaint.

85. This defendant denies the allegations of the eighty-fifth paragraph of the Complaint.

86. This defendant's responses to paragraphs 1-29, 32 and 33 of the Complaint are contained hereinabove.

87. This defendant denies the allegations of the eighty-seventh paragraph of the Complaint.

88. This defendant's responses to paragraphs 64-73 and 75 of the Complaint are contained hereinabove.

89. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the eighty-ninth paragraph of the Complaint and accordingly denies the same.

90. This defendant denies the allegations of the ninetieth paragraph of the Complaint.

91. This defendant denies the allegations of the ninety-first paragraph of the Complaint.

92. This defendant's responses to paragraphs 1-29, 32 and 33 of the Complaint are contained hereinabove.

93. This defendant denies the allegations of the ninety-third paragraph of the Complaint.

94. This defendant's responses to paragraphs 64-73 and 75 of the Complaint are contained hereinabove.

95. This defendant lacks information sufficient to form a belief as to the truth of the allegations of the ninety-fifth paragraph of the Complaint and accordingly denies the same.

96. This defendant denies the allegations of the ninety-sixth paragraph of the Complaint.

97. This defendant denies the allegations of the ninety-seventh paragraph of the Complaint.

98. This defendant's responses to paragraphs 1-29 and 64-73 of the Complaint are contained hereinabove.

99. This defendant denies the allegations of the ninety-ninth paragraph of the Complaint.

100. This defendant denies the allegations of the one-hundredth paragraph of the Complaint.

101. This defendant denies the allegations of the one hundred-first paragraph of the Complaint.

102. This defendant's responses to paragraphs 1-29 of the Complaint are contained hereinabove.

103. This defendant's responses to paragraphs 64-70 of the Complaint are contained hereinabove.

104. This defendant denies the allegations of the one hundred-fourth paragraph of the Complaint.

105. This defendant denies the allegations of the one hundred-fifth paragraph of the Complaint.

106. This defendant denies the allegations of the one hundred-sixth paragraph of the Complaint.

107. This defendant denies the allegations of the one hundred-seventh paragraph of the Complaint.

108. This defendant denies the allegations of the one hundred-eighth paragraph of the Complaint.

109. This defendant denies the allegations of the one hundred-ninth paragraph of the Complaint.

110. This defendant's responses to paragraphs 1-29, 64-72, 78 and 104-107 of the Complaint are contained hereinabove.

111. This defendant denies the allegations of the one hundred-eleventh paragraph of the Complaint.

112. This defendant denies the allegations of the one hundred-twelfth paragraph of the Complaint.

113. This defendant denies the allegations of the one hundred-thirteenth paragraph of the Complaint.

FIRST AFFIRMATIVE DEFENSE

114. This defendant is not subject to personal jurisdiction in the Commonwealth of Massachusetts.

SECOND AFFIRMATIVE DEFENSE

115. This defendant did not give any advice or make any recommendation to plaintiff with respect to plaintiff's purchase of a CD offered by Penn Square. This defendant is a rate quoting service which provides by telephone to sophisticated institutional investors, such as plaintiff, CD rates offered by various banking institutions. This defendant owes no duty, contractual or otherwise, to plaintiff in connection with plaintiff's decision to purchase a CD from Penn Square.

THIRD AFFIRMATIVE DEFENSE

116. On information and belief, on or about July 5, 1982, the Comptroller of the Currency declared Penn Square to be insolvent and appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver for Penn Square. On information and belief, as of that date, plaintiff held a $1 million CD issued by Penn Square, and shortly thereafter, plaintiff received $100,000 from the FDIC pursuant to Penn Square's insurance with FDIC. Further on information and belief, plaintiff filed a claim with the FDIC for the remaining amount of $900,000, all of which has or will be paid to plaintiff through the FDIC out of a fund set aside by the FDIC for payment to Penn Square's creditors. Accordingly, plaintiff has not sustained any damages in connection with its purchase of a CD from Penn Square, and all payments to plaintiff by the FDIC constitute an offset to the claim against this defendant herein.

FOURTH AFFIRMATIVE DEFENSE

117. Even assuming, *arguendo*, that plaintiff had sustained any damages in connection with its purchase of a CD issued by Penn Square, such damages would be the result of plaintiff's own acts or omissions, negligence or fault, and not the result of any wrongdoing by this defendant.

FIFTH AFFIRMATIVE DEFENSE

118. The Complaint and each count thereof fail to state a claim against this defendant upon which relief can be granted.

WHEREFORE, this answering defendant, First United Fund, Ltd., demands judgment of this Court dismissing the plaintiff's Complaint and awarding to First United Fund, Ltd. its costs, including reasonable attorneys' fees, together with its disbursements herein.

By its attorneys,

/s/ Richard L. Dahlen
RICHARD L. DAHLEN

/s/ Susan G. L. Glovsky
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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BROCKTON SAVINGS BANK,
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PEAT, MARWICK, MITCHELL & CO., *et al.*,
Defendants.

FIRST UNITED FUND, LTD.'S ANSWERS AND OBJECTIONS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

Defendant First United Fund, Ltd. ("United") answers and objects to the Interrogatories propounded by plaintiff, Brockton Savings Bank ("BSB"), dated February 24, 1983, as follows:

General Objections

United objects to all Interrogatories insofar as they may call for information relating to any period of time other than April 2, 1982 through July 5, 1982 on the grounds that such information is beyond the permissible scope of discovery, irrelevant and does not appear reasonably calculated to lead to the discovery of admissible evidence. Where convenient, United has included in its Answer to certain Interrogatories information relating to periods other than April 2, 1982 through July 5, 1982, without waiving its objection to the irrelevancy thereof. United further objects to and ignores the definitions and instructions at the beginning of the interrogatories.

Interrogatory No. 1

Identify each person who gathered or furnished information for, or assisted in the preparation of, or signed, the answers to these interrogatories and for each such person:

(a) describe his role; and

(b) state the interrogatories for which he supplied information or with which he was otherwise involved.

Answer To Interrogatory No. 1

(a) (i) Mario Renda
First United Fund, Ltd.

Address on April 28, 1982:

370 Old Country Road
Garden City, New York
(516) 747-1260

Present Address:

1001 Franklin Avenue
Garden City, New York 11530
(516) 747-1260

Mr. Renda was president of United at all times relevant hereto and is currently president of United. Mr. Renda's role was to review all responses to these Interrogatories and to assist in preparing responses relating to the United's general business practices.

(ii) Joseph DeCarlo
(same address and telephone)

Mr. DeCarlo was executive vice president of United at all times relevant hereto and is executive vice president of United at present. Mr. DeCarlo's role was to supply responses to Interrogatories where possible, to obtain responses from appropriate others where necessary, and to review all responses to these Interrogatories.

(iii) Thomas Schofield
(same address and telephone)

Mr. Schofield was an account executive of United at all times relevant hereto and is an account executive of United at present. Mr. Schofield's role was to supply information for responses to Interrogatories which called for his knowledge gained through his personally handling BSB's account with United.

(iv) Kirk Armstrong
(same address and telephone)

Mr. Armstrong was an account executive of United at all times relevant hereto and is an account executive of United at present. Mr. Armstrong's role was to supply information for responses to Interrogatories which called for his knowledge gained through his personally handling Penn Square Bank, N.A.'s ("Penn Square('s)") account with United.

(b) *See* Answer to Interrogatory 1(a) above.

Interrogatory No. 2

Identify First United.

Answer To Interrogatory No. 2

United's full name is First United Fund, Ltd. United is a corporation which was incorporated in the State of New York in or about January, 1980 and its major business is quoting to institutional investors rates offered by banking institutions on certificates of deposit ("CD's"). United's address is set forth in the Answer To Interrogatory No. 1.

Interrogatory No. 3

Identify Schofield.

Answer To Interrogatory No. 3

See Answer To Interrogatory No. 1.

Interrogatory No. 4

Identify the officers of First United.

Answer To Interrogatory No. 4

See Answer To Interrogatory No. 1.

Interrogatory No. 5

Identify the directors of First United.

Answer To Interrogatory No. 5

The directors of United are Mario Renda, Joseph DeCarlo and Antoinette Renda. Messrs. Renda and DeCarlo are further identified in the Answer to Interrogatory No. 1. Antoinette Renda's business address and telephone number as director of United is set forth in the Answer to Interrogatory No. 1.

Interrogatory No. 6

Describe all First United policies, standards, practices and procedures related to First United's determination whether to broker an issuer's CDs or other investment or commercial paper.

Answer To Interrogatory No. 6

At all times relevant hereto, it was United's practice in determining whether to quote rates on CD's for a banking institution to ascertain that the institution was federally or state insured in the amount of $100,000 per CD. Generally, United would also obtain a copy of the institution's financial statement.

Interrogatory No. 7

Did First United deviate in any way from the policies, standards, practices and procedures described in Interrogatory 6 in determining whether to broker CDs or other commercial or investment paper issued by Penn Square? If so, describe in detail the manner in which the policies, standards, procedures and practices employed in such determination deviated from those described in Interrogatory 6.

Answer To Interrogatory No. 7

No.

Interrogatory No. 8

Describe all the ways in which First United's policies, standards, practices and procedures related to its determination whether to broker an issuer's CDs or other investment or commercial paper depend on whether or not the face amount of such paper is insured.

Answer to Interrogatory No. 8

See Answer To Interrogatory No. 6.

Interrogatory No. 9

Identify all documents prepared by or distributed by First United relating or pertaining to its solicitation of prospective purchasers and sellers (including, without limitation, issuers) of and the marketing of CDs or other investment or commercial paper.

Answer To Interrogatory No. 9

United has prepared and distributed a form letter sent to potential investors and a form letter sent to issuers of CD's, copies of which have already been provided to plaintiff in response to Request No. 2 of plaintiff's First Request For Production Of Documents From First United Fund, Ltd. ("Plaintiff's Production Request").

Interrogatory No. 10

Identify all banks for which First United provides or has provided brokerage services with respect to the sale or offer for sale of CDs or other investment or commercial paper; and state, with respect to each bank, the date on which First United first provided such services.

Answer And Objection To Interrogatory No. 10

United quoted rates for Penn Square commencing on or about April 2, 1982. United objects to Interrogatory No. 10 insofar as it seeks identification of the hundreds of other banking institutions for which United has quoted rates and the dates United first provided such services on the grounds that: (i) such information is not related to the facts or claims involved in this lawsuit and not reasonably calculated to lead to discovery of admissible evidence and therefore, not within the scope of permissible discovery; (ii) Interrogatory No. 10 is unnecessarily broad and unduly burdensome with respect to both subject matter and time frame; and (iii) the identification of banks, other than Penn Square, for which United provides services, is confidential information as to which United does not have, nor can it as a practical business matter obtain from all banking institutions, the necessary consent to make such information available to plaintiff.

Interrogatory No. 11

State the date on which First United first provided brokerage services to any banking institution.

Answer To Interrogatory No. 11

United first did business in the nature of quoting rates on CD's on the first business day in January, 1980.

Interrogatory No. 12

What is the average commission or other fee, expressed both as a percentage of face amount and also expressed

in dollar amount, received during calendar years 1981 and 1982 by First United for its services in brokering:

a) CDs of face amount less than $100,000?

b) CDs of face amount equal to or greater than $1,000,000?

Answer To Interrogatory No. 12

(a) None.

(b) The approximate average commission rate received by United in 1981 and 1982 for its services in quoting rates on CD's in the amount of $1,000,000 or greater was approximately ½% prorated annually or $833.33.

Interrogatory No. 13

Identify each person, affiliated in any capacity with First United, who initially contacted or was contacted by Penn Square for the purpose of brokering CDs or other commercial or investment paper; identify all documents and oral communications which constitute, concern, refer to or relate to such initial contact; and state the date on which such contact with Penn Square was made.

Answer To Interrogatory No. 13

In early March of 1982, Kirk Armstrong initially contacted Bert Davis III about the possibility of United's quoting rates on Penn Square's CD's. Mr. Davis did not at that time commit to using United's quoting service and there are no documents relating to such initial contact.

Interrogatory No. 14

Describe all business transactions, including without limitation, banking and brokerage services, and all business, social and familial relationships or affiliations between First United and Penn Square which have oc-

curred or existed at any time, irrespective of Instruction G.

Answer And Objection To Interrogatory No. 14

There have not been any social or familial relationships between United and Penn Square. The only relationship between United and Penn Square is the relationship described in the Brokerage Commission Agreement dated April 21, 1982 between those parties, a copy of which has previously been provided to plaintiff in accordance with Request No. 8 of Plaintiff's Production Request.

United objects to Interrogatory No. 14 insofar as it may call for the names, dates and other details of individual transactions between Penn Square and investors or potential investors to whom United quoted Penn Square's rates on CD's on the grounds that such information is not related to the facts or claims involved in this lawsuit and not reasonably calculated to lead to discovery of admissible evidence and therefore, not within the scope of permissible discovery; (ii) Interrogatory No. 14 is unnecessarily broad and unduly burdensome with respect to both subject matter and time frame; and (iii) the identity of the parties to and details of such transactions are confidential to the particular parties involved in each investment, and United does not have, nor can it as a practical business matter obtain from all parties to all investments, the necessary consent to make such information available to plaintiff.

Interrogatory No. 15

Identify all documents and oral communications sent or initiated by Penn Square to First United.

Answer And Objection To Interrogatory No. 15

(a) The following relevant documents were sent or initiated by Penn Square to United:

(i) A letter dated April 16, 1982 from Bert Davis III to Kirk Armstrong and enclosed 1981 financial statement and Annual Report for Penn Square (received by United approximately a few days after April 16, 1982) and

(ii) Penn Square's March 31, 1982 Statement of Condition (received by United in or about early May, 1982).

(b) On or about April 2, 1982, Penn Square, by Bert Davis III, requested United, by Kirk Armstrong, to quote to institutional investors the rates on Penn Square's CD's which Penn Square would inform United of on a daily basis. Penn Square, by Bert Davis III, initiated several telephone conversaitons with Kirk Armstrong during the period April 2, 1982 through July 2, 1982, regarding the amount of funds involved and the interest rate and maturity period of CD's Penn Square was offering.

United objects to Interrogatory No. 15 insofar as it may call for information relating or referring in any way to sales or offers to sell CD's other than Penn Square Bank's sale on April 28, 1982 of the CD in issue to BSB on the grounds that: (i) such information is not related to the facts or claims involved in this lawsuit and not reasonably calculated to lead to discovery of admissible evidence and therefore, not within the scope of permissible discovery; (ii) Interrogatory No. 15 is unnecessarily broad and unduly burdensome with respect to both subject matter and time frame; and (iii) the identification of investors in Penn Square, other than plaintiff, and facts as to such others' investments are confidential information as to which United does not have nor can it as a practical matter obtain the necessary consent from such others to make such information available to plaintiff.

Interrogatory No. 16

Identify all documents and oral communications sent or initiated by First United to Penn Square.

Answer And Objection To Interrogatory No. 16

(a) The following documents were sent or initiated by United to Penn Square:

(i) A letter dated May 7, 1982 and attached computer printout containing certain details of BSB's purchase of the CD in question;

(ii) The Brokerage Commission Agreement referenced in response to Interrogatory No. 14; and

(iii) The confirmation slip sent by United to Penn Square confirming BSB's purchase in issue.

(b) Prior to April 2, 1982, United, by Kirk Armstrong, contacted Penn Square, by Bert Davis III, regarding the possibility of United's quoting rates to institutional investors on CD's offered by Penn Square. United, by Kirk Armstrong, initiated several telephone conversations with Bert Davis III during the period April 2, 1982 through July 2, 1982 regarding the amount of funds involved and the interest rate and maturity period of CD's Penn Square was offering. On April 28, 1982, although Kirk Armstrong does not recall who initiated the telephone conversation, he spoke with Bert Davis III, who advised that Penn Square was offering 90-day CD's at a gross rate of 16½% interest. Later that day, Mr. Armstrong informed Mr. Davis that Mr. Armstrong had quoted a rate of 16% to BSB. Shortly thereafter, Mr. Davis informed Mr. Armstrong that BSB had purchased a 90-day CD in the amount of $1 million. On July 2, 1982, Mr. Armstrong telephoned

Mr. Davis, asking if there was any truth to rumors that Penn Square was in financial difficulty and FDIC was involved. Mr. Davis assured Mr. Armstrong that there was no cause for concern. Mr. DeCarlo also telephoned Mr. Davis on July 2, 1982 and was advised not to worry, and that these were just "vicious rumors".

United objects to Interrogatory No. 16 insofar as it may call for information relating or referring in any way to sales or offers to sell CD's other than Penn Square's sale on April 28, 1982 of the CD in issue to BSB on the grounds that: (i) such information is not related to the facts or claims involved in this lawsuit and not reasonably calculated to lead to discovery of admissible evidence and therefore, not within the scope of permissible discovery; (ii) Interrogatory No. 16 is unnecessarily broad and unduly burdensome with respect to both subject matter and time frame; and (iii) the identification of investors in Penn Square, other than plaintiff, and facts as to such others' investments is confidential information as to which United does not have nor can it as a practical matter obtain the necessary consent from such others to make such information available to plaintiff.

Interrogatory No. 17

Has First United ever communicated directly with Peat Marwick concerning Penn Square? If so, identify the persons who participated in such communications; state the dates on which such communications took place; and identify all documents and oral communications which constitute, concern, refer to or relate to such communications.

Answer To Interrogatory No. 17

No.

Interrogatory No. 18

Identify all documents and oral communications, regardless of source, concerning Penn Square which First United received prior to April 28, 1982; identify the sources of such information; state the dates on which such information was received; and describe all documents and oral communications which contain or pertain to such information.

Answer And Objection To Interrogatory No. 18

See the documents described in the Answer to Interrogatory No. 15 under subheading (a)(i) and the Answer to Interrogatory No. 16 under subheading (a)(ii) and those conversations which occurred prior to April 28, 1982, described in the Answer to Interrogatory No. 15 under subheading (b), and in the Answer to Interrogatory No. 16 under subheading (b).

United objects to Interrogatory No. 18 insofar as it may call for information relating or referring to transactions other than BSB's purchase of the CD in issue on grounds of irrelevancy, overbreadth, burdensomeness and confidentiality, as set forth more fully in the Answer to Interrogatory No. 16 above.

Interrogatory No. 19

Identify all documents and oral communications, regardless of source, concerning Penn Square which First United received on or after April 28, 1982; identify the sources of such information; state the dates on which such information was received; and describe all documents and oral communications which contain or pertain to such information. Did First United communicate any of this information to any other person, and if so, identify each such person and state the date such information was communicated.

Answer And Objection To Interrogatory No. 19

See the documents described in the Answer To Interrogatory No. 15 under subheading (a)(ii) and those conversations which occurred on or after April 28, 1982 described in the Answer To Interrogatory No. 15 under subheading (b) and the Answer to Interrogatory No. 16 under subheading (b).

On April 28, 1982, Thomas Schofield spoke by telephone with Brad Drew. Mr. Schofield advised Mr. Drew, *inter alia*, that Penn Square was offering $100,000 CD's with a 90 day maturity at an interest rate of 16%. Mr. Drew advised that he had to get approval and ascertain through another service utilized by BSB whether Penn Square was in sufficiently good financial standing to warrant BSB's purchase of such a CD. Approximately one hour later, Mr. Drew telephoned Mr. Schofield and advised that the service with which BSB had checked had given a "B" rating to Penn Square and on that basis, Mr. Drew's superiors had determined to invest $1,000,000 in a Penn Square CD for a term of 90 days at 16% interest. Mr. Schofield provided the necessary information to enable BSB to wire its funds directly to Penn Square. Shortly thereafter, United sent a confirmation slip to Penn Square and to BSB, confirming that transaction.

In addition, United had a subscription to the American Banker and received various other releases and newspapers containing articles about Penn Square on or after July 5, 1982, copies of which have already been provided in response to Request No. 6 of Plaintiff's Production Request.

United objects to Interrogatory No. 19 insofar as it may call for information relating or referring to transactions other than BSB's purchase of the CD in issue on

grounds or irrelevancy, overbreadth and confidentiality as more fully set forth in response to Interrogatory No. 16 above.

Interrogatory No. 20

Identify and describe all research, tests and procedures performed by First United in determining whether to provide brokerage services to Penn Square.

Answer To Interrogatory No. 20

See Answer To Interrogatory No. 6.

Interrogatory No. 21

Did First United enter into any agreements with Penn Square? If so, provide the following information:

(a) Describe fully the terms and conditions of all such agreements.

(b) Identify all documents which embody the terms and conditions of such agreements.

Answer To Interrogatory No. 21

Yes.

(a) A copy of the Brokerage Commission Agreement dated April 21, 1982 has previously been provided to plaintiff in response to Request No. 8 of Plaintiff's Production Request. Further, pursuant to an oral understanding between United, by Kirk Armstrong, and Penn Square, by Bert Davis III, United would offer Penn Square's CD's to potential purchasers at a rate so as to yield to United a brokerage commission of 50 basis points (one-half percent) on a prorated annual basis.

(b) There are no documents other than the Brokerage Commission Agreement referenced above

which embody the terms and conditions of United's agreement with Penn Square.

Interrogatory No. 22

Describe all commission and other fee arrangements that existed between First United and Penn Square.

Answer To Interrogatory No. 22

See Answer to Interrogatory No. 21.

Interrogatory No. 23

Describe, as a percentage of face amount and in total dollar amount, the commission or other fee arrangement Penn Square agreed to pay First United for brokering the BSB CD.

Answer To Interrogatory No. 23

United's fee arrangement with Penn Square respecting BSB's purchase of the CD in issue was for Penn Square to pay United one half of one percent of the face value of the CD prorated per year of investment, *i.e.*, the face amount of the CD ($1,000,000) X ½% X the portion of a year for which the investment was made (¼). The dollar amount of the commission was $1,250, which constitutes one-eighth of one percent of the face amount of the CD.

Interrogatory No. 24

Identify each person affiliated with First United who was responsible for managing or supervising the brokerage of CDs or other investment or commercial paper issued by Penn Square.

Answer To Interrogatory No. 24

Mario Renda
Joseph DeCarlo
Kirk Armstrong

See Answer to Interrogatory No. 1 for further identification of Messrs. Renda, DeCarlo and Armstrong.

Interrogatory No. 25

Did First United know or have information, prior to April 28, 1982, that the OCC was or had been engaged in an investigation of Penn Square? If so, state the date on which First United first acquired such knowledge or information, identify each source of such knowledge or information, and identify each person to whom First United communicated any such knowledge or information and state the date that such communication was made.

Answer To Interrogatory No. 25

No.

Interrogatory No. 26

Did First United know or have information, on or after April 28, 1982, that the OCC was or had been engaged in an investigation of Penn Square? If so, state the date on which First United first acquired such knowledge or information, identify each source of such knowledge or information, and identify each person to whom First United communicated any such knowledge or information and state the date that such communication was made.

Answer And Objection To Interrogatory No. 26

After July 5, 1982, various officers and employees read in the newspapers and other periodicals that the OCC had been engaged in an investigation of Penn Square. Probably, the first article containing that information was read by someone at United on or about July 6, 1982 in

an article of that date in the American Banker, a copy of which has previously been provided to plaintiff in response to Request No. 10 of Plaintiff's Production Request.

United objects to identification of each person with whom United may have discussed such articles or information on the grounds of irrelevance as to subject matter and time frame as more fully set forth in response to Interrogatory No. 16.

Interrogatory No. 27

Did First United know or have information, prior to April 28, 1982, that Penn Square was or had engaged in activities or practices that constituted violations of state and/or federal law? If so, describe in detail the nature of all such activities and practices; state with respect to each the date on which First United knew or obtained information concerning such activity or practice; identify the source of such knowledge or information, and identify each person to whom First United communicated any of such knowledge or information and state the date such communication was made.

Answer To Interrogatory No. 27

No.

Interrogatory No. 28

Did First United know or have information, on or after April 28, 1982, that Penn Square was or had engaged in activities or practices that constituted violations of state and/or federal law? If so, describe in detail the nature of all such activities and practices; state with respect to each the date on which First United knew or obtained information concerning such activity or practice; identify the source of such knowledge or information,

and identify each person to whom First United communicated any of such knowledge or information and state the date such communication was made.

Answer And Objection To Interrogatory No. 28

See Answer and Objection to Interrogatory No. 26.

Interrogatory No. 29

Describe Penn Square's reputation in the banking and financial communities on or about April 28, 1982 to the extent that First United was familiar with such reputation.

Answer To Interrogatory No. 29

United did not have knowledge of Penn Square's reputation in the banking and financial communities on or about April 28, 1982.

Interrogatory No. 30

Describe Penn Square's reputation in the banking and financial communities after April 28, 1982 and up to July 5, 1982, to the extent that First United was familiar with such reputation.

Answer To Interrogatory No. 30

United was unaware of the reputation of Penn Square until on or about July 2, 1982, when rumor spread that Penn Square was in financial trouble, and this rumor strengthened between July 2 and July 5, 1982.

Interrogatory No. 31

State the date on which First United first learned that Arthur Young and Company had rendered a quali-

fied opinion with respect to Penn Square's 1980 financial statements.

Answer To Interrogatory No. 31

On or about July 27, 1982.

Interrogatory No. 32

Did First United ever receive a copy of the Arthur Young and Company audit report of Penn Square's 1980 financial statements? If so, state the date on which such report was received; identify each person who sent such report to First United, and identify each person to whom First United sent a copy of all or any portion of such report and state the date on which the report was sent to each such person.

Answer To Interrogatory No. 32

No.

Interrogatory No. 33

State the date on which First United first learned of the contents of Peat Marwick's audit report, including its unqualified opinion of Penn Square's 1981 financial statements.

Answer To Interrogatory No. 33

United first learned that Peat Marwick had given Penn Square a "clean bill of health" in its audit report when United read that fact on or about July 5, 1982 in an article in the American Banker of that date, a copy of which was provided to BSB.

Interrogatory No. 34

Did First United ever receive a copy of the Peat Marwick audit report, including its unqualified opinion of Penn Square's 1981 financial statement? If so, state the date on which such report was received; identify each person who sent such report to First United, identify each person to whom First United sent a copy of all or any portion of such report and state the date on which the report was sent to each such person.

Answer To Interrogatory No. 34

No.

Interrogatory No. 35

Has First United ever communicated directly with defendant Peat Marwick? If so, identify the persons who participated in such communications; state the dates on which such communications took place; and identify all documents and oral communications which constitute, concern, refer to or relate to all such communications.

Answer To Interrogatory No. 35

No.

Interrogatory No. 36

Describe all insurance policies which afford First United coverage for claims of the nature made against it by the plaintiff Brockton Savings Bank; state the name of each issurer or carrier of such policies; and state the limits of coverage provided in each policy.

Answer To Interrogatory No. 36

None.

Dated: April 21, 1983

FIRST UNITED FUND, LTD.,
By Its Attorneys,

/s/ Richard L. Dahlen
RICHARD L. DAHLEN
DAHLEN & GATEWOOD
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Suite 405
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(617) 451-1560

Of Counsel:

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(212) 757-2400

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

JOSEPH DeCARLO, being duly sworn, says:

1. I am Executive Vice President of defendant First United Fund, Ltd.

2. I have read the foregoing Answers and Objections to Interrogatories, and the same are true to the best of my present knowledge, information and belief.

/s/ Joseph DeCarlo
JOSEPH DECARLO

Sworn to before me this 20th day of April, 1983.

/s/ Douglas M. Russell
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-0478-N

BROCKTON SAVINGS BANK,
Plaintiff,

v.

PEAT, MARWICK, MITCHELL & CO., *et al.*,
Defendants.

FIRST UNITED FUND, LTD.'S RESPONSE TO PLANTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, defendant First United Fund, Ltd. ("United") responds to each request in the first document demand by plaintiff, Brockton Savings Bank ("BSB"), as follows, subject to the general objections set forth below.

General Objections

1. In responding to this document demand, United objects to and ignores the "Definitions and Instructions" at the beginning of the demand. This, on the grounds that such definitions and instructions are not contemplated or provided for by the Federal Rules of Civil Procedure, that they are unnecessary to the formulation of intelligible and useful requests, and that, as applied to the requests actually made, they are confusing and contradictory.

2. United objects to producing any documents created by or for United or by or for any representative of United (including United's attorneys, consultants, sure-

ties, indemnitors, insurers or agents) in anticipation of litigation or for trial or in connection with this action on the grounds that such documents are not subject to production under the work product doctrine and Rule 26(b) of the Federal Rules of Civil Procedure.

3. United objects to all requests insofar as they demand production of documents or portions of documents containing information relating or referring in any way to purchases or prospective purchases of certificates of deposit ("CD's") other than BSB's purchase of the Penn Square Bank CD in issue and to sales of CD's other than Penn Square Bank's sale of the CD in issue to BSB on the grounds that: (i) such documents and information are not related to the facts or claims involved in this lawsuit and not reasonably calculated to lead to discovery of admissible evidence and therefore, not within the scope of permissible discovery; (ii) the requests for such documents and information are unnecessarily broad and unduly burdensome; and (iii) the identity of the parties to and nature of sales brokered by United are confidential to the particular parties involved in each sale, and United does not have, nor can it as a practical business matter obtain from all parties to all sales, the necessary consent to make such information available to plaintiff.

4. United objects to all requests insofar as they demand production of documents containing information relating or referring to any period of time other than the period April 2, 1982 through July 5, 1982 on the grounds that such information is irrelevant, does not appear reasonably calculated to lead to the discovery of admissible evidence and is thus beyond the permissible scope of discovery. Where convenient, United has provided documents containing information relating to periods other than the period March 1, 1982 through July 5, 1982 without waiving its objection based on irrelevancy.

United's Responses

Request No. 1

All documents which constitute, contain, refer to, or relate to the policies, standards, procedures or practices with which First United complies or attempts to comply with respect to First United's determination whether to broker an issuer's CD's or other investment or commercial paper.

Response to Request No. 1

United is aware or no documents responsive to Request No. 1.

Request No. 2

All documents prepared by or distributed by First United relating or pertaining to its solicitation of prospective purchasers and sellers (including, without limitation, issuers) of and the marketing of CD's or other investment or commercial papers.

Response to Request No. 2

Subject to the General Objections stated above, United will produce all documents responsive to Request No. 2.

Request No. 3

All documents, including with limitation, letters, audited financial statements, and annual reports, sent by Penn Square to First United.

Response to Request No. 3

United will produce all documents responsive to Request No. 3.

Request No. 4

All documents sent by First United to Penn Square.

Response to Request No. 4

Subject to the General Objections stated above, United will produce all documents responsive to Request No. 4. Although United has made diligent attempts to locate the confirmation slip of the CD transaction in issue, a copy of which United sent to Penn Square Bank, United has not yet been able to locate it. United will continue its efforts and, if the slip is found, will promptly provide a copy of the slip to plaintiff.

Request No. 5

All documents, regardless of source, which concern, refer to or relate to Penn Square which First United received prior to April 28, 1982.

Response to Request No. 5

Subject to the General Objections stated above, United will produce all of the documents responsive to Request No. 5.

Request No. 6

All documents, regardless of source, which concern, refer to or relate to Penn Square which First United received on or after April 28, 1982.

Response to Request No. 6

Subject to the General Objections stated above, United will produce all of the documents responsive to Request No. 6.

Request No. 7

All documents which constitute, contain, relate to or refer to research, tests and procedures performed by First United in determining whether to provide brokerage services to Penn Square.

Request No. 8

All documents which constitute, contain, relate to or refer to the terms and conditions of all agreements between First United and Penn Square.

Response to Request No. 8

United is aware of no documents responsive to Request No. 8 except for the Brokerage Commission Agreement between Penn Square Bank and United dated April 21, 1982, a copy of which United will produce to plaintiff.

Request No. 9

All documents, of which First United had knowledge or possession prior to April 28, 1982, and which constitute, contain, relate to or refer to examinations and investigations of Penn Square by the OCC.

Response to Request No. 9

United is aware of no documents responsive to Request No. 9.

Request No. 10

All documents, of which First United had knowledge or possession on or after April 28, 1982, and which constitute, contain, relate to or refer to examinations and investigations of Penn Square by the OCC.

Response to Request No. 10

Subject to the General Objections stated above, United will produce all documents responsive to Request No. 10.

Request No. 11

All documents, of which First United had knowledge or possession prior to April 28, 1982, and which constitute, contain, refer to or relate to activities and prac-

tices engaged in by Penn Square that constitute violations of state and/or federal law.

Response to Request No. 11

United is aware of no documents responsive to Request No. 11.

Request No. 12

All documents, of which First United had knowledge or possession on or after April 28, 1982, and which constitute, contain, refer to or relate to activities and practices engaged in by Penn Square that constitute violations of state and/or federal law.

Response to Request No. 12

United will produce all documents responsive to Request No. 12.

Request No. 13

All documents, of which First United had knowledge or possession prior to April 28, 1982, which were prepared by Peat Marwick and which concern, refer to or relate to Penn Square.

Response to Request No. 13

The only document potentially responsive to Request No. 13 is a 1981 financial statement for Penn Square Bank, which United will produce to plaintiff. Although that statement was sent to United by Penn Square Bank with a covering letter identifying the statement as "our audited financial statements", United has no knowledge as to whether or by whom the statement was audited.

Request No. 14

All documents, of which First United had knowledge or possession on or after April 28, 1982, which were pre-

pared by Peat Marwick and which concern, refer to or relate to Penn Square.

Response to Request No. 14

United is aware of no documents responsive to Request No. 14.

Request No. 15

All documents, of which First United had knowledge or possession prior to April 28, 1982, which were prepared by Arthur Young and Company and which concern, refer to or relate to Penn Square.

Response to Request No. 15

United is aware of no documents responsive to Request No. 15.

Request No. 16

All documents, of which First United had knowledge or possession on or after April 28, 1982, which were prepared by Arthur Young and Company and which concern, refer to or relate to Penn Square.

Response to Request No. 16

United is aware of no documents responsive to Request No. 16.

Request No. 17

All documents which constitute, concern, refer to or relate to all communications between First United and defendant Peat Marwick.

Response to Request No. 17

United is aware of no documents responsive to Request No. 17.

Request No. 18

All insurance policies which provide coverage to First United for claims of the nature made against First United by Plaintiff Brockton Savings Bank.

Response to Request No. 18

United is aware of no documents responsive to Request No. 18.

Request No. 19

All documents identified in the answers to Plaintiff's First Set of Interrogatories Propounded to Defendant First United Fund, Ltd., other than those documents which you will produce in response to Requests 1 through 18 herein.

Response to Request No. 19

Subject to the General Objections stated above, United will produce all documents responsive to Request No. 19.

Dated: April 21, 1983

FIRST UNITED FUND, LTD.,
By Its Attorneys,

/s/ Richard L. Dahlen
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Of Counsel:

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-0478-N

BROCKTON SAVINGS BANK,
Plaintiff

v.

PEAT, MARWICK, MITCHELL & CO., *et al.*,
Defendants

PLAINTIFF'S MOTION TO COMPEL DISCOVERY FROM DEFENDANT FIRST UNITED FUND, LTD.

Pursuant to Fed. R. Civ. P. 37(a), plaintiff Brockton Savings Bank ("BSB") moves this Court for an order compelling defendant First United Fund, Ltd. ("First United"): (a) to produce documents improperly withheld from discovery; and (b) to provide answers or further answers to plaintiff's interrogatories, as follows:

A. *Documents*

1. To produce all documents requested by Plaintiff's First Request for Production of Documents from First United Fund ("BSB's Document Request"), attached hereto as Exhibit "A", and which were prepared on, relate to or refer to dates or time periods between January 1, 1980 and December 31, 1982, to the extent not already produced.[1]

As grounds for this part of its Motion, plaintiff states as follows:

---

[1] In its Request, BSB defined the relevant time period as January 1, 1978 to date, but has learned that First United was incorporated in January, 1980.

a. In its Response to Plaintiff's First Request for Production of Documents ("First United's Response), attached hereto as Exhibit "B", First United unilaterally interposed a blanket general objection to "all requests insofar as they demand production of documents containing information relating or referring to any period of time other than the period April 2, 1982 through July 5, 1982." (Exhibit "B", p. 3, ¶ 4).

b. First United interposed limitations on the time frame of BSB's Request for the alleged reason that information relating to periods outside the three-month period is "irrelevant", "not reasonably calculated to lead to the discovery of admissible evidence," and therefore "beyond the scope of discovery."

c. The unreasonably narrow time period limitation imposed by First United prevents BSB from discovering highly relevant and material information bearing directly on the subject matter of this action.

2. To produce all documents responsive to BSB's Document Request, including documents relating or referring in any way to purchases and sales, and prospective purchases and sales of certificates of deposit ("CDs") other than BSB's purchase of the Penn Square CD, to the extent such documents have not already been produced.

As grounds for this part of its Motion, plaintiff states:

a. In its Response to BSB's Document Request, First United interposed a general objection to "all requests insofar as they demand production of documents or portions of documents containing information relating or referring in any way to purchases or prospective purchases of [CDs] other than BSB's purchase of the Penn Square Bank CD in issue and to sales of CD's other than Penn Square Bank's sale

of the CD in issue to BSB . . ." (Exhibit "B", p. 2, ¶ 3).

b. First United's alleged grounds for its refusal to produce documents relating to transactions other than the BSB purchase are that such documents are "not related to the facts or claims involved in this lawsuit," are not "reasonably calculated to lead to discovery of admissible evidence," are not within the scope of discovery, that information contained in such documents is "confidential," and that the Requests are "unnecessarily broad and unduly burdensome."

c. BSB's Document Request is reasonably calculated to lead to the discovery of admissible evidence, and is within the scope of discovery as set forth in Fed. R. Civ. P. 26(b).

d. None of the documents BSB has sought to discover are in fact protected from discovery by reason of confidentiality. Nevertheless, BSB is willing and has offered to enter into an appropriate stipulation regarding confidentiality, an offer that First United has rejected.

B. *Interrogatories*

1. To provide complete answers to Plaintiff's First Set of Interrogatories Propounded to Defendant First United Fund ("BSB's Interrogatories"), attached hereto as Exhibit "C", with respect to the time period January 1, 1980 through December 31, 1982, to the extent not already answered.

As grounds for this part of its Motion, plaintiff states:

a. In its Answers and Objections to Plaintiff's First Set of Interrogatories ("First United's Answers and Objections"), attached hereto as Exhibit "D", First United interposed a blanket general objection "to all Interrogatories insofar as they may

call for information relating to any period of time other than April 2, 1982 through July 5, 1982 . . ." (Exhibit "D", p. 1).

b. First United interposed limitations on the time frame of BSB's Interrogatories for the alleged reason that information relating to periods outside the three-month period is "beyond the permissible scope of discovery, irrelevant and does not appear reasonably calculated to lead to the discovery of admissible evidence."

c. The unreasonably narrow time period limitation imposed by First United prevents BSB from discovering highly relevant and material information bearing directly on the subject matter of this action.

2. To provide complete answers to Interrogatories Nos. 10, 14, 15, 16, 18 and 19 of BSB's Interrogatories, including information relating to CD purchasers other than BSB, to CD sellers or offerors other than Penn Square Bank, and to transactions other than the purchase and sale of the Penn Square CD, to the extent such Interrogatories are not already completely answered.

As grounds for this part of its Motion, BSB states:

a. In its Answers and Objections to BSB's Interrogatories, First United refused to identify banks for which it provides or has provided brokerage services as requested in Interrogatory No. 10; refused to describe business transactions between First United and Penn Square as requested in Interrogatory No. 14 insofar as it calls for details of individual transactions between Penn Square and investors or potential investors to whom First United quoted Penn Square's rates on CDs; refused to identify any documents or oral communications between Penn Square and First United in response to Interrogatories Nos. 15 and 16 that relate or refer in any way to sales or offers to sell CDs other than the April 28, 1982 sale

to BSB; and refused to identify documents and oral communications it received concerning Penn Square, as requested in Interrogatories Nos. 18 and 19, that relate or refer to transactions other than BSB's purcase of the Penn Square CD.

b. First United's alleged grounds for its refusal to provide information relating to transactions other than the not reasonably calculated to lead to discovery of admissible evidence and therefore, not within the scope of permissible discovery," [sic] and is "confidential," and that the interrogatories are "unnecessarily broad and unduly burdensome."

c. BSB's Interrogatories Nos. 10, 14, 15, 16, 18 and 19 are reasonably calculated to lead to the discovery of admissible evidence and are within the scope of discovery as set forth in Fed. R. Civ. P. 26(b). Documents related to transactions other than the sale of the Penn Square CD to BSB are highly relevant to material issues in this action; for example, whether First United was fraudulent or negligent in brokering Penn Square CDs, in representing that it had investigated Penn Square's financial condition, and in representing that investment in Penn Square would be safe.

d. None of the information BSB has sought to discover is in fact protected from discovery by reason of confidentiality. Nevertheless, BSB is willing and has offered to enter into an appropriate stipulation regarding confidentiality, an offer that First United has rejected.

3. To identify all persons with whom First United communicated regarding the investigation of Penn Square Bank by the Office of the Comptroller of the Currency ("OCC") and to state the date on which each such communication was made as requested in Interrogatory No. 26.

As grounds for this part of its Motion, plaintiff states as follows:

a. First United refused to identify persons with whom it discussed the OCC investigation of Penn Square, as requested by Interrogatory No. 26, on the alleged grounds of "irrelevance as to subject matter and time frame."

b. Whether First United communicated with investors or others about the OCC investigation of Penn Square, and the identities of the persons with whom First United communicated are obviously relevant to material issues in this case; that is, how much First United knew about Penn Square's financial condition before the bank failed and whether and whom First United warned of the impending failure.

WHEREFORE, plaintiff requests that the Court enter an order compelling defendant First United:

1. To produce all documents requested in BSB's Document Requests, for the period January 1, 1980 through December 31, 1982, to the extent not already produced.

2. To produce all documents responsive to BSB's Document Requests that relate to transactions other than BSB's purchase of the Penn Square CD.

3. To respond to all BSB's Interrogatories with respect to the period January 1, 1980 through December 31, 1982.

4. To respond fully to BSB's Interrogatories Nos. 10, 14, 15, 16, 18, 19 and 26.

A memorandum in support of this Motion is filed herewith.

BSB requests oral argument of this Motion, which should require no more than 20 minutes in total.

Respectfully submitted,

BROCKTON SAVINGS BANK

By its Attorneys,

/s/ Michael S. Greco
MICHAEL S. GRECO

/s/ Robert G. Bone
ROBERT G. BONE

/s/ Jeanne M. Kempthorne
JEANNE M. KEMPTHORNE

HILL & BARLOW
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6200

DATED: May 9, 1983

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-0478-N

BROCKTON SAVINGS BANK,
Plaintiff,

v.

PEAT, MARWICK, MITCHELL & CO., *et al.*,
Defendants.

OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DISCOVERY

The defendant First United Fund, Ltd., hereby opposes, pursuant to Local Rule 12(a)(2), the plaintiff's pending motion to compel discovery.

This opposition is made on the grounds that the plaintiff is seeking to discover all available information and documents concerning all of the transactions this defendant has ever had with all of this defendant's customers, and that only information concerning dealings with the plaintiff—already provided in full to the plaintiff—can be relevant here within the meaning of Rule 26(b)(1), Federal Rules of Civil Procedure.

This opposition is supported by two affidavits and a memorandum of law, filed herewith.

This defendant joins in the plaintiff's request for oral argument.

By its attorneys,

/s/ Richard L. Dahlen
RICHARD L. DAHLEN
SUSAN G. L. GLOVSKY
DAHLEN & GATEWOOD
75 Federal Street
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(617) 451-1560

Of Counsel:

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New York, New York 10105
(212) 757-2400

DATED: May 27, 1983

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-0478-N

BROCKTON SAVINGS BANK,
Plaintiff,

v.

PEAT, MARWICK, MITCHELL & CO., *et al.*,
Defendants.

MOTION FOR SANCTIONS

Plaintiff Brockton Savings Bank ("BSB") hereby moves, pursuant to Fed. R. Civ. P. 37(b)(2) for sanctions against defendant First United Fund, Ltd. ("FUF") for failure to comply with this Court's discovery orders. In particular, BSB moves that (1) judgment by default and (2) an order of contempt be entered against FUF, under Fed. R. Civ. P. 37(b)(2)(C) and (D). BSB further requests that the Court require FUF and/or its attorneys to pay BSB's reasonable expenses, including attorney's fees, and to grant BSB any other relief the Court deems just.

As grounds for this Motion, BSB states that FUF has wilfully and egregiously failed to obey several orders and directives of the Court to provide and permit discovery.

BSB submits herewith a memorandum in further support of this Motion.

BSB requests a hearing on this motion, which should require no more than 20 minutes for both sides.

BROCKTON SAVINGS BANK

By its Attorneys,

/s/ Michael S. Greco
MICHAEL S. GRECO

/s/ Jeanne M. Kempthorne
JEANNE M. KEMPTHORNE

HILL & BARLOW
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6200

DATED: February 7, 1984

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-0478-N

BROCKTON SAVINGS BANK,
Plaintiff,

v.

PEAT, MARWICK, MITCHELL & CO., *et al.*,
Defendants.

OPPOSITION TO MOTION FOR SANCTIONS

The defendant First United Fund, Ltd., hereby opposes, pursuant to Local Rule 12(a)(3), the motion for sanctions filed in this action by the plaintiff.

The motion is based on the unsupported allegation that this defendant has failed to comply with discovery orders.

This opposition is based on the following grounds:

First, this defendant has made substantial efforts to effect reasonable compliance with all orders of this Court.

Second, the plaintiff has had its counsel spend only fifteen minutes of an attorney's time and three and a quarter hours of a paralegal's time reviewing the most recent fruits of that compliance—two large boxes of documents.

Third, this defendant has offered to produce all other relevant documents which the plaintiff's counsel, having reviewed the documents already produced, will specify as being necessary and missing.

An affidavit of counsel filed herewith addresses specific inaccuracies in the plaintiff's motion papers.

The defendant respectfully submits that the motion for sanctions is frivolous and inappropriate.

By its attorneys,

/s/ Richard L. Dahlen
RICHARD L. DAHLEN

/s/ Susan G. L. Glovsky
SUSAN G. L. GLOVSKY

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Of Counsel:

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-0478-N

BROCKTON SAVINGS BANK,
Plaintiff,

v.

PEAT, MARWICK, MITCHELL & CO., *et al.*,
Defendants.

AFFIDAVIT OF CHRISTINE LYNNE ALEXANDER

STATE OF NEW YORK) SS
COUNTY OF NASSAU)

Christine Lynne Alexander, residing at 555 Merrick Road, Rockville Centre, New York 11570, being first duly sworn, on her oath deposes and says that:

1. I am and have been for the past two years an Executive Secretary for First United Fund, Ltd., a defendant herein, whose principal place of business is located at 1001 Franklin Avenue, Garden City, New York 11530.

2. As an Executive Secretary my duties consist of, but are not limited to, the typing of correspondence, filing and other clerical duties.

3. I make this affidavit to apprise the Court of the procedures followed by First United Fund, Ltd. during the period from April to December, 1982, with respect to sending letters to clients at the request of Account Executives.

4. During the aforesaid time period, First United Fund, Ltd's. Account Executives utilized eight distinct

form letters in which to communicate with a prospective client. The substance of said letters was retained in a word processor's memory bank in order that a prospective client's name and address could easily be programmed into the processor, thereby generating a custom letter for each prospective client.

5. When an Account Executive wished to send a form letter to a prospective client, he would approach your deponent with only the name and address of the prospective client and the number of the form letter desired.

6. Your deponent would then type the aforesaid information into the word processor and said machine would generate the form letter requested, including the appropriate name and address.

7. As the substance of the forms was stored in our processor's memory banks, copies of said form correspondence sent to a prospective client at an Account Executives [sic] request were felt to be unnecessary and, as a result, not retained.

/s/ Christine L. Alexander
CHRISTINE LYNNE ALEXANDER

Subscribed and sworn to before me this 28th day of February, 1984.

/s/ Stuart M. Steinberg
Notary Public
My commission expires: March 30, 1985

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-0478-N

BROCKTON SAVINGS BANK,
Plaintiff,

v.

PEAT, MARWICK, MITCHELL & CO., *et al.*,
Defendants.

AFFIDAVIT OF CHRISTINE LYNNE ALEXANDER

STATE OF NEW YORK) SS
COUNTY OF NASSAU)

Christine Lynne Alexander, residing at 555 Merrick Road, Rockville Centre, New York 11570, being first duly sworn, on her oath deposes and says that:

In the affidavit of February 28, 1984, I stated in Paragraph 7 thereof, that the form correspondence were sent to a prospective client at an Account Executive's request and copies were not "retained".

To further explain what your deponent meant was that copies of the form correspondence were not made. No copies were necessary for First United Fund, Ltd.'s business purpose.

Therefore, only originals were produced and these originals were sent to prospective clients.

We have never had any copies of these letters.

/s/ Christine Lynne Alexander
CHRISTINE LYNNE ALEXANDER

Subscribed and sworn to before me this 5th day of March, 1984.

/s/ Stuart M. Steinberg
Notary Public
My commission expires: March 30, 1985

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 83-0478-N

BROCKTON SAVINGS BANK,
Plaintiff,

v.

PEAT, MARWICK, MITCHELL & CO., *et al.*,
Defendants.

AFFIDAVIT OF STUART M. STEINBERG, ESQ.

STATE OF NEW YORK) SS
COUNTY OF NASSAU)

Stuart M. Steinberg, being first duly sworn, on his oath deposes and says that:

1. I am an attorney at law, duly admitted to practice before the Appellate Division, Second Department of the State of New York, and before the United States District Courts for the Southern and Eastern Districts of New York; I am and have been General Counsel to First United Fund, Ltd., (First United), a defendant in this action, for the past five months.

2. This affidavit is made from my own personal knowledge and to evidence to this court the procedures I followed in efforts to dilligently [sic] comply with Plaintiff's documentary demands for copies of letters, the originals of which were utilized by First United to solicit prospective clients.

3. I am familiar with the business records maintained by First United which consist of the following: confirma-

tion slips, billing sheets, form letters and commission agreements between First United and a banking institution, when said institutions return the agreement. Only fifty percent of the banking institutions return the aforesaid agreements.

4. Confirmation slips which are generated by First United's computer department are produced in triplicate and contain the following information: The party the certificate of deposit is issued to, the issuing institution, the date the certificate of deposit is issued, the face amount of the certificate of deposit, the interest rate said certificate will earn, the period of time the certificate is being issued for, the tax identification number of the investor, indication whether the certificate is being held in safekeeping, First United's commission and an indication as to when interest is being paid; i.e., monthly or at maturity.

5. A copy of this confirmation slip is sent to the issuer of the certificate of deposit, the investor and First United retains a copy for their records. As such Plaintiff has a copy of the confirmation slip(s) evidencing the transactions in which Plaintiff enlisted First United's services.

6. In an attempt to comply with Plaintiff's demand for production of First United's copies of the confirmation slip relevant to this action, your deponent, sent by way of Parcel Post and at First United's expense, two cartons containing confirmation slips believed to be the ones relevant herein to our local counsel's office in Boston, Massachusetts, for Plaintiff's review.

Said cartons were unfortunately marked improperly and although believed by your deponent to contain the information Plaintiff requested, did not.

7. In a further effort to dilligently [sic] comply with Plaintiff's said demand, and to save Plaintiff's attorney time and effort, your deponent personally expended three hours rummaging through additional cartons of these con-

firmation slips to find the ones relevant to this action. These confirmation slips have already been produced.

8. With respect to Plaintiff's demand for copies of letters, the originals of which are utilized by First United to solicit prospective clients; these have never existed.

9. First United solicits hundreds of prospective clients a day by either telephoning or by written correspondence. As this is a volumnous [sic] procedure, it is impractical and unnecessary for First United's business purpose to produce and maintain copies of these solicitation letters.

10. The substance of these solicitation letters is stored in a word processor's memory bank. When an Account Executive wishes to send a form letter to a prospective client, he furnishes a secretary with the number of the form requested and the name and address of said client. This information is programmed into the word processor and a customized letter is produced. A copy of this letter is not produced, only an original is, which is sent to the prospective client.

11. However, in an effort to comply with Plaintiff's said demands, your deponent personally went through files, set up for billing purposes, to ascertain whether any copies of these letters were retained. These billing files are the only files maintained in the ordinary course of First United's certificate of deposit business.

12. Additionally, separate correspondence files are not maintained or are ones felt necessary for First United's certificate of deposit business purposes, as all pertinent information is contained in the confirmation slips, as aforementioned.

13. In the few situations, however, when First United sends or receives written communications from an investor or an issuing institution, this correspondence is maintained in the aforementioned billing files. This correspondence would be filed according to the institution

issuing the certificate of deposit. Thus, any correspondence from or to Penn Square investors, or to or from Penn Square itself, would be in the Penn Square file. Your deponent has searched said file and no such correspondence was found.

14. All documents in First United's possession and relating to First United's transaction with respect to Penn Square and its investors have already been produced in accordance with Plaintiff's demands.

/s/ Stuart M. Steinberg
STUART M. STEINBERG, ESQ.

Subscribed and sworn to before me this 5th day of March, 1984.

/s/ Douglas M. Russell
Notary Public

My commission expires: March 30, 1985